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Supreme Court, U.S.
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No. 09-402

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In The

Supreme Court of the United States

MARKICE LAVERT McCANE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *United States v. Leon*, 468 U.S. 897 (1984), this Court created a good-faith exception to the exclusionary rule of the Fourth Amendment. The Court has expanded the good-faith exception over time, most recently in *Herring v. United States*, 129 S. Ct. 695 (2009). This case asks the Court to resolve a deep three-way split in the lower courts over whether the good-faith exception applies to changing interpretations of law. The question presented is this:

> "Whether the good-faith exception to the exclusionary rule applies to a search authorized by precedent at the time of the search that is subsequently ruled unconstitutional."

PARTIES TO THE PROCEEDING

Petitioner is Markice McCane, an individual. Respondent is the United States.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PETITION FOR CERTIORARI	1
OPINION BELOW	1
JURISDICTIONAL STATEMENT	1
RELEVANT CONSTITUTIONAL PROVISION	1
STATEMENT	2
REASONS FOR GRANTING THE PETITION	5
I. A THREE-WAY CIRCUIT SPLIT EXISTS ON WHETHER THE GOOD-FAITH EXCEPTION EXTENDS TO RELIANCE ON OVERTURNED LAW: TWO CIRCUITS AND TWO STATE SUPREME COURTS CONCLUDE IT DOES; ONE CIRCUIT CONCLUDES IT DOES NOT; AND TWO CIRCUITS CONCLUDE IT DEPENDS ON WHETHER A WARRANT WAS OBTAINED	8
II. THE DECISION BELOW DIRECTLY CONFLICTS WITH THIS COURT'S OWN PRECEDENTS, INCLUDING *ARIZONA V. GANT* ITSELF	16

TABLE OF CONTENTS – Continued

Page

III. THIS IS A RECURRING ISSUE OF NATIONAL IMPORTANCE THAT HAS PERCOLATED FOR OVER TWO DECADES, AND THIS CASE PRESENTS THE IDEAL VEHICLE FOR SUPREME COURT REVIEW 21

CONCLUSION 24

APPENDIX

United States v. McCane, 573 F.3d 1037 (10th Cir. 2009) ..... App. 1

United States v. McCane, 2008 WL 2740926 (W.D. Okla. 2008) ..... App. 30

TABLE OF AUTHORITIES

Page

CASES

Acker v. United States, 533 U.S. 913 (2001) 13

Arizona v. Evans, 514 U.S. 1 (1995) 4, 16

Arizona v. Gant, 129 S. Ct. 1710 (2009) ..... *passim*

Goldman v. United States, 316 U.S. 129 (1942) 18

Griffith v. Kentucky, 479 U.S. 314 (1987) 11, 17, 18

Groh v. Ramirez, 540 U.S. 551 (2004) 20

Herring v. United States, 129 S. Ct. 695 (2009) 4, 7, 21

Illinois v. Krull, 480 U.S. 340 (1987) 4, 15

Katz v. United States, 389 U.S. 347 (1967) 18, 19

Kyllo v. United States, 533 U.S. 27 (2001) 13

New York v. Belton, 453 U.S. 454 (1981) ..... *passim*

Olmstead v. United States, 277 U.S. 438 (1928) 18

Payton v. New York, 445 U.S. 573 (1980) 17

People v. Arnold, ___ N.E.2d ___, 2009 WL 2661136 (Ill. App. 2 Dist., Aug. 26, 2009) 22

Powell v. Nevada, 511 U.S. 79 (1994) 17

Richards v. Wisconsin, 520 U.S. 385 (1997) 9

State v. Herrick, 588 N.W.2d 847 (N.D. 1999) 6, 10

State v. Ward, 604 N.W.2d 517 (Wis. 2000) 6, 9, 10

TABLE OF AUTHORITIES – Continued

Page

Stone v. Powell, 428 U.S. 465 (1976).....17

Teague v. Lane, 489 U.S. 288 (1989).....17

United States v. 15324 County Highway E., 219 F.3d 602 (7th Cir. 2000).....13, 14, 15

United States v. Allison, ___ F. Supp.2d ___, 2009 WL 2218693 (S.D. Iowa, July 24, 2009).....23

United States v. Brothers, 438 F.3d 1068 (10th Cir. 2006).....3

United States v. Brunette, 256 F.3d 14 (1st Cir. 2001).....6, 15

United States v. Buford, 623 F. Supp.2d 923 (M.D. Tenn. 2009).....22

United States v. Cotton, 751 F.2d 1146 (10th Cir. 1985).....3

United States v. Curzi, 867 F.2d 36, 44 (1st Cir. 1989).....15

United States v. Deitz, 577 F.3d 672 (6th Cir. 2009).....23

United States v. Gonzales, ___ F.3d ___, 2009 WL 2581738 (9th Cir. 2009).....6, 10, 11, 22

United States v. Gonzales, 290 Fed. Appx. 51 (9th Cir. 2008).....11

United States v. Grote, 2009 WL 2068023 (E.D. Wash., July 15, 2009).....23

United States v. Jackson, 825 F.2d 853 (5th Cir. 1987).....6, 8, 9

TABLE OF AUTHORITIES – Continued

Page

United States v. Johnson, 457 U.S. 537 (1982) 11, 16, 17, 18

United States v. Leon, 468 U.S. 897 (1984) 4, 15, 16, 20

United States v. Lopez, 2009 WL 2840490 (E.D. Ky., Sept. 1 2009) 23

United States v. McCane, 573 F.3d 1037 (10th Cir. 2009) 6, 8

United States v. Morgan, 835 F.2d 79 (5th Cir. 1987) 9

United States v. Owens, 2009 WL 2584570 (N.D. Fla., Aug. 20, 2009) 23

United States v. Real Property Located at 15324 County Highway E., 332 F.3d 1070 (7th Cir. 2003) 6, 12, 13, 14

United States v. Syphers, 426 F.3d 461 (1st Cir. 2005) 15

STATUTES

18 U.S.C. § 922(g)(1) 2

28 U.S.C. § 1254(1) 1

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Adam Liptak, *Justices Step Closer to Repeal of Evidence Ruling*, N.Y. Times, Jan 30, 2009 21

Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 Green Bag 2d 413, 416 (2009) 22

PETITION FOR CERTIORARI

Mr. Markice McCane respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is published at 573 F.3d 1037. It is reprinted in the Appendix at Pet. App. 1.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on July 28, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing

the place to be searched, and the persons or things to be seized.

STATEMENT

This is a Fourth Amendment case about the scope of the exclusionary rule. On April 28, 2007, Oklahoma City Police Officer Aaron Ulman stopped a vehicle for a traffic violation. Officer Ulman approached the vehicle and asked the driver, later identified as the Petitioner Markice McCane, for his license and identification. McCane responded that his license was suspended. Officer Ulman ran a computer check and confirmed that McCane's license was suspended.

Officer Ulman arrested McCane for driving with a suspended license, placed him in handcuffs, and put him in the back seat of the patrol car. Ulman then searched the passenger compartment of the car incident to McCane's arrest under *New York v. Belton*, 453 U.S. 454 (1981). During the search, he found a loaded .25 caliber firearm hidden under a rag in the pocket of the driver's side door.

McCane was charged in federal court with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He filed a motion to suppress the firearm on the ground that the car was searched in violation of his Fourth Amendment rights. The district court denied the motion on the ground that the search was authorized by *Belton* as interpreted by the

Tenth Circuit in *United States v. Brothers*, 438 F.3d 1068, 1073 (10th Cir. 2006), and *United States v. Cotton*, 751 F.2d 1146, 1148-49 (10th Cir. 1985). *See* Pet. App. 38-39. A jury convicted McCane, and he was sentenced to serve 63 months in prison. He then appealed his conviction on several grounds, including that the search of the car violated his Fourth Amendment rights.

While McCane's appeal was pending before the Tenth Circuit, this Court decided *Arizona v. Gant*, 129 S. Ct. 1710 (2009). The facts of *Gant* were very similar to this case. Gant was arrested for driving on a suspended license, and he was handcuffed and then put in the back of the police squad car. Two officers searched Gant's vehicle incident to arrest, revealing a gun and cocaine in the car. Although lower courts had widely upheld this practice under *Belton*, the Court announced that such searches were no longer to be considered justified incident to arrest. *See id.* at 1719. *Gant* instead announced the rule that searches incident to arrest in the automobile context are constitutional "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" or it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Id.*

In the decision below, the Tenth Circuit concluded that although the search was unconstitutional under *Gant*, McCane's conviction should be affirmed because the good-faith exception to the exclusionary rule applied. The Tenth Circuit held that the good-faith

exception applies "when law enforcement officers act in objectively reasonable reliance upon the settled case law of a United States Court of Appeals." Pet. App. 18. The exception applied to McCane's case because Officer Ulman's search was "wholly consistent with and supported by this court's precedent prior to *Gant*." Pet. App. 9. Because Officer Ulman relied in good faith on pre-*Gant* case law, "[t]he good-faith exception to the exclusionary rule applies in this case" and the motion to suppress was properly denied. Pet. App. 18.

The Tenth Circuit reached this conclusion by first surveying the Supreme Court's quartet of good-faith cases: *United States v. Leon*, 468 U.S. 897 (1984); *Illinois v. Krull*, 480 U.S. 340 (1987); *Arizona v. Evans*, 514 U.S. 1 (1995); and *Herring v. United States*, 129 S. Ct. 695 (2009). *Leon* introduced the good-faith exception and applied it to reliance on an invalid search warrant. *Krull* expanded the exception and applied it to reliance on a constitutionally invalid statute. Both *Evans* and *Herring* extended the exception to reliance on a mistaken belief that a warrant authorized the suspect's arrest.

The Tenth Circuit interpreted these cases to stand for the view that the exclusionary rule should apply only when it deters police misconduct. Pet. App. 15. Applying this principle, the court concluded that the good-faith exception should apply to searches authorized by then-existing precedents:

> Just as there is no misconduct on the part of a law enforcement officer who reasonably relies upon the mistake of a court employee in entering data, or the mistake of a legislature in passing a statute later determined to be unconstitutional, a police officer who undertakes a search in reasonable reliance upon the settled case law of a United States Court of Appeals, even though the search is later deemed invalid by Supreme Court decision, has not engaged in misconduct. The refrain in *Leon* and the succession of Supreme Court good-faith cases is that the exclusionary rule should not be applied to objectively reasonable law enforcement activity. Relying upon the settled case law of a United States Court of Appeals certainly qualifies as objectively reasonable law enforcement behavior.

Pet. App. 15-16 (internal citations and quotations omitted).

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to resolve the deep and irreconcilable three-way split among the lower courts and this Court about whether the good-faith exception applies when a search that was considered lawful at the time it occurred is later ruled unconstitutional.

This recurring question of Fourth Amendment law is raised every time a court issues a ruling in a

defendant's favor that departs unexpectedly from earlier decisions. Criminal defendants with similar cases still in the pipeline will invoke the new ruling in support of suppression. The question is, does the new case apply in full force so that the evidence is suppressed? Or does the good-faith exception to the exclusionary rule apply so that the evidence is admitted?

A deep three-way circuit split has emerged to answer this question. The Tenth Circuit, the Fifth Circuit, and two state Supreme Courts have held that the good-faith exception applies in such settings. *See United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009); *United States v. Jackson*, 825 F.2d 853 (5th Cir. 1987); *State v. Ward*, 604 N.W.2d 517 (Wis. 2000); *State v. Herrick*, 588 N.W.2d 847 (N.D. 1999). In contrast, the Ninth Circuit has held that the good-faith exception does not apply. *See United States v. Gonzales*, ___ F.3d ___, 2009 WL 2581738 (9th Cir. 2009). Finally, the Seventh Circuit and the First Circuit have taken a third approach that applies the good-faith exception in some circumstances but not others. *See United States v. Real Property Located at 15324 County Highway E.*, 332 F.3d 1070 (7th Cir. 2003); *United States v. Brunette*, 256 F.3d 14, 19 (1st Cir. 2001). This Court should grant the petition to resolve the disagreement in the lower courts.

Certiorari is also warranted because the opinion below conflicts with the Supreme Court's own guidance. Although the Court has never directly addressed whether the good-faith exception applies to overruled precedents, it has repeatedly addressed whether new Fourth Amendment rules apply to cases on direct review. In those cases, the Court has concluded that the Fourth Amendment applies and convictions based on the fruits of unconstitutional searches must be overturned. The Tenth Circuit's contrary conclusion demands Supreme Court review.

Finally, this case provides the ideal vehicle for review. The combination of two recent Fourth Amendment decisions, *Herring v. United States* and *Arizona v. Gant,* triggered a great deal of litigation in the lower courts on the precise issue raised by this petition. The sharp division in the lower courts demonstrates that this Court will have to resolve the issue eventually. Because this is the first petition to reach the Court after *Herring* and *Gant*, and the deep split already exists, this is the ideal case to review. Sound judicial administration strongly counsels that the Court grant certiorari now rather than allow the lower courts to continue amidst widespread confusion and uncertainty.

I. A THREE-WAY CIRCUIT SPLIT EXISTS ON WHETHER THE GOOD-FAITH EXCEPTION EXTENDS TO RELIANCE ON OVERTURNED LAW: TWO CIRCUITS AND TWO STATE SUPREME COURTS CONCLUDE IT DOES; ONE CIRCUIT CONCLUDES IT DOES NOT; AND TWO CIRCUITS CONCLUDE IT DEPENDS ON WHETHER A WARRANT WAS OBTAINED.

(a) Good-Faith Exception Recognized: Tenth Circuit, Fifth Circuit, and two state Supreme Courts. The Tenth Circuit adopted the good-faith exception for reliance on subsequently overturned precedents in the decision below, *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009). According to the Tenth Circuit, the good-faith exception applies "when law enforcement officers act in objectively reasonable reliance upon the settled case law of a United States Court of Appeals" that is later recognized as "unconstitutional by a Supreme Court decision." Pet. App. 15. Because "[r]elying upon the settled case law of a United States Court of Appeals certainly qualifies as objectively reasonable law enforcement behavior," Pet. App. 16, the good-faith exception applies and the evidence is admitted.

The Fifth Circuit reached the same result in *United States v. Jackson*, 825 F.2d 853 (5th Cir. 1987) (en banc). *Jackson* overturned Fifth Circuit precedent that had allowed warrantless searches at a checkpoint under the border search exception to the Fourth Amendment. The *en banc* court in *Jackson* ruled that

the checkpoint searches were unconstitutional, but then applied the good-faith exception and affirmed the convictions in light of the officers' reasonable reliance on Fifth Circuit law. *Id.* at 866. The court reasoned that officers who relied on then-existing circuit precedent were not acting lawlessly and did not need to be deterred. As a result, "the exclusionary rule should not be applied to searches which relied on Fifth Circuit law prior to the change of that law on the date of the delivery of this opinion." *Id. See also United States v. Morgan*, 835 F.2d 79, 80-81 (5th Cir. 1987) (applying good-faith exception for changed interpretations of law recognized by *Jackson*).

Two state supreme courts have adopted the same approach. *See State v. Ward*, 604 N.W.2d 517 (Wis. 2000); *State v. Herrick*, 588 N.W.2d 847 (N.D. 1999). Both cases involved "no-knock" searches that had been allowed by state court precedents authorizing no-knock warrants in all felony drug investigations prior to this Court's decision in *Richards v. Wisconsin*, 520 U.S. 385 (1997). *Richards* rejected a *per se* exception to the knock-and-announce rule and instead required a case-by-case determination of need for a no-knock warrant. *Id.* at 393-94.

After *Richards* was decided, defendants tried to invoke the exclusionary rule in cases that could not satisfy the case-by-case standard. The Supreme Court of Wisconsin and the Supreme Court of North Dakota each held that the good-faith exception applied to such pre-*Richards* searches in light of state court precedents allowing no-knock searches. *See Ward*,

604 N.W.2d at 749-50; *Herrick*, 588 N.W.2d at 850-51. As the Supreme Court of Wisconsin explained in *Ward*:

> [W]e cannot say now that the subsequent change in Fourth Amendment jurisprudence has somehow transformed the character of the evidence seized at the Ward home into something so tainted that it mars judicial integrity. Nor will any remedial purpose be achieved through exclusion of the evidence when the officers and magistrate followed, rather than defied, the rule of law.

Ward, 604 N.W.2d at 750. *See also Herrick*, 588 N.W.2d at 850-51 (holding that the good-faith exception applied because the officers "operated under the belief that if drugs were present a no-knock warrant was justifiably obtainable," a belief "directly traceable to our prior rulings," so that "law enforcement officers would have no reason to doubt the validity of a no-knock warrant issued in a drug case by a magistrate or judge.").

(b) No Good-Faith Exception: Ninth Circuit. In contrast, the Ninth Circuit has flatly rejected the good-faith exception for changing law in a case with facts essentially identical to those in this petition. *See United States v. Gonzales*, ___ F.3d ___, 2009 WL 2581738 (9th Cir., Aug. 24, 2009). Like this petition, *Gonzales* involved a search that complied with circuit precedent when it occurred but was later ruled unlawful by *Arizona v. Gant,* 129 S. Ct. 1710 (2009). Gonzales was arrested and placed in the back of the

squad car in a traffic stop. A search of the car incident to arrest uncovered a pistol in the glovebox. The Ninth Circuit initially affirmed in a routine unpublished decision. *United States v. Gonzales*, 290 Fed. Appx. 51 (9th Cir. 2008). The Supreme Court then handed down *Gant*, and the Court granted, vacated, and remanded the *Gonzales* case in light of *Gant*.

On remand, the Ninth Circuit ruled that the good-faith exception did not apply and therefore reversed the conviction. *See United States v. Gonzales*, ___ F.3d ___, 2009 WL 2581738 (9th Cir. 2009). In an opinion by Judge Betty Fletcher, the Ninth Circuit reasoned that applying the good-faith exception would "violate the integrity of judicial review by turning the court into, in effect, a legislative body announcing new rules but not applying them, rather than acting in our proper role as an adjudicative body deciding cases." *Id.* at *2. Further, the good-faith exception could not apply because its application would conflict with the Supreme Court's retroactivity decisions:

> [T]his case should be controlled by long-standing precedent governing the applicability of a new rule announced by the Supreme Court while a case is on direct review. The Court has held that "a decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered." *United States v. Johnson*, 457 U.S. 537, 562 (1982); *see Griffith v. Kentucky*, 479 U.S. 314, 328

> (1987) (finding that even decisions constituting a "clear break" with past precedent have retroactive application). This precedent requires us to apply *Gant* to the current case without the overlay of an application of the good-faith exception. To hold that *Gant* may not be fully applied here, as the Government urges, would conflict with the Court's retroactivity precedents.

Id. at *2. Because the facts of the case were very similar to those of *Gant*, *Gant* applied and the motion to suppress was granted. *See id.* at *1 ("We hold that *Gant* requires that Appellant Ricardo Gonzalez's motion to suppress be granted and, therefore, Gonzalez's conviction be reversed.").

(c) No Good-Faith Exception Unless A Warrant Was Obtained: Seventh Circuit and First Circuit. Two circuits have taken a third approach that hinges on whether the police later obtained a warrant. If the police seek admission of evidence that was obtained directly from a warrantless search deemed unconstitutional by subsequent case developments, the good-faith exception does not apply. On the other hand, the good-faith exception *does* apply if investigators use evidence from the unlawful warrantless search to create probable cause for a search warrant.

The Seventh Circuit adopted this mixed approach in *United States v. Real Property Located at 15324 County Highway E.*, 332 F.3d 1070 (7th Cir. 2003). The police had scanned the suspect's home with a thermal imaging device without a warrant to

determine if he was growing marijuana inside. The scan established probable cause for a warrant to search the home, and the police used that cause to obtain a warrant. A search pursuant to the warrant led to the discovery of narcotics and then forfeiture proceedings. Based on Seventh Circuit precedent holding that use of a thermal imaging device was not a search, the Seventh Circuit initially affirmed the forfeiture against a Fourth Amendment challenge. *See United States v. 15324 County Highway E.*, 219 F.3d 602 (7th Cir. 2000).

Soon after the Seventh Circuit's decision, the Supreme Court held that use of a thermal imaging device was a search in *Kyllo v. United States*, 533 U.S. 27 (2001). Following *Kyllo*, the Supreme Court granted, vacated, and remanded the Seventh Circuit's decision. *Acker v. United States*, 533 U.S. 913 (2001). The Seventh Circuit held on remand that the good-faith exception applies only if the police obtain a warrant following the warrantless search later deemed unconstitutional. *15324 County Highway E.*, 332 F.3d at 1075-76. Under this rule, no good-faith exception applies if the government seeks admission of evidence obtained as a fruit of a warrantless search later deemed unlawful:

> We decline to extend further the applicability of the good-faith exception to evidence seized during law enforcement searches conducted in naked reliance upon subsequently overruled case law . . . absent magistrate approval by way of a search warrant.

Id. at 1076. On the other hand, if the police conduct a warrantless search that is later ruled unconstitutional, and they then use the fruits of that search to obtain a warrant, the good-faith exception applies to the fruits of the warrant search:

> [W]e hold that evidence seized by law enforcement agents acting in objectively reasonable reliance upon a validly issued search warrant that, through no misconduct on the part of the agents, rests on a constitutionally flawed probable cause finding owing to a subsequent change in controlling judicial precedent, is not subject to the exclusionary rule.

Id. at 1076. Because the officers had only used the thermal imaging device to establish probable cause, and they had obtained a warrant to search the home, the good-faith exception applied and the order denying the motion to suppress was affirmed. *Id.*

The Seventh Circuit justified this mixed approach on the ground that if a magistrate judge evaluates the conduct and approves the warrant, there can be no misconduct by the officers that would justify suppression: "any error that is said to have occurred must be attributed to the magistrate, and not law enforcement agents, for the former was in a relatively better position to divine the as-yet unannounced unconstitutionality of the thermal imaging scan." *Id.* at 1075. On the other hand, allowing the good-faith exception absent an intervening warrant

"would have undesirable, unintended consequences" by forcing police officers to take on that task. *Id.* at 1076.

The First Circuit has suggested a similar approach, although its cases have not made the point as clearly and directly as the Seventh Circuit. When the government has obtained a warrant, the First Circuit has applied the good-faith exception by factoring in the state of case law at the time the search occurred. *See, e.g., United States v. Brunette*, 256 F.3d 14, 19 (1st Cir. 2001) (holding that "the uncertain state of the law at the time made reliance on the warrant objectively reasonable" even though the warrant was held unlawful in precedents handed down after the search occurred); *United States v. Syphers*, 426 F.3d 461, 468 (1st Cir. 2005) (analyzing good faith for fruits of a warrant based on "then-prevailing caselaw" at the time the search was executed). On the other hand, the First Circuit has rejected the application of the good-faith exception when the government has not obtained a warrant. *See United States v. Curzi*, 867 F.2d 36, 44 (1st Cir. 1989) (noting that the First Circuit "has not recognized a good-faith exception in respect to warrantless searches," and rejecting an extension of *Leon* and *Krull* to warrantless searches not authorized by statute).

The division in the lower courts is deep, irreconcilable, and outcome-determinative. If no good-faith exception exists for reliance on overturned precedents, the evidence will be excluded: The Fourth Amendment has been violated and the exclusionary rule applies. On the other hand, if a good-faith

"would have undesirable, unintended consequences" by forcing police officers to take on that task. *Id.* at 1076.

The First Circuit has suggested a similar approach, although its cases have not made the point as clearly and directly as the Seventh Circuit. When the government has obtained a warrant, the First Circuit has applied the good-faith exception by factoring in the state of case law at the time the search occurred. *See, e.g., United States v. Brunette*, 256 F.3d 14, 19 (1st Cir. 2001) (holding that "the uncertain state of the law at the time made reliance on the warrant objectively reasonable" even though the warrant was held unlawful in precedents handed down after the search occurred); *United States v. Syphers*, 426 F.3d 461, 468 (1st Cir. 2005) (analyzing good faith for fruits of a warrant based on "then-prevailing caselaw" at the time the search was executed). On the other hand, the First Circuit has rejected the application of the good-faith exception when the government has not obtained a warrant. *See United States v. Curzi*, 867 F.2d 36, 44 (1st Cir. 1989) (noting that the First Circuit "has not recognized a good-faith exception in respect to warrantless searches," and rejecting an extension of *Leon* and *Krull* to warrantless searches not authorized by statute).

The division in the lower courts is deep, irreconcilable, and outcome-determinative. If no good-faith exception exists for reliance on overturned precedents, the evidence will be excluded: The Fourth Amendment has been violated and the exclusionary rule applies. On the other hand, if a good-faith

exception does exist, the evidence normally will be admitted: A police officer in the field cannot be expected to predict the future of Fourth Amendment law, so reliance on existing cases will be in good faith. The division in the lower circuits is therefore not only a conceptual difference in approach. It is the difference between denying a motion to suppress and granting it.

II. THE DECISION BELOW DIRECTLY CONFLICTS WITH THIS COURT'S OWN PRECEDENTS, INCLUDING *ARIZONA V. GANT* ITSELF.

This court should also grant certiorari because the decision below conflicts with the precedents of this Court. Although this Court has never directly decided whether the good-faith exception applies to searches that are later ruled unconstitutional, the Court has repeatedly addressed whether good-faith reliance on overruled Fourth Amendment caselaw provides a basis to affirm criminal convictions obtained in violation of the Fourth Amendment. The Court has repeatedly concluded it does not. The contrast between the decision below and the extensive guidance of this Court demands Supreme Court review.

Good-faith reliance on overruled Fourth Amendment caselaw traditionally has been addressed by the Court's retroactivity caselaw. In *United States v. Johnson*, 457 U.S. 537 (1982), the Court held that

new Fourth Amendment decisions apply to other cases on direct appeal. Johnson was arrested at his home without a warrant prior to this Court's ruling in *Payton v. New York*, 445 U.S. 573 (1980), that declared such warrantless home arrests unconstitutional. The question in *Johnson* was "whether the rule announced in *Payton* applies to an arrest that took place before *Payton* was decided." *Johnson*, 457 U.S. at 539. After reviewing the history of retroactivity law, especially in the Fourth Amendment setting, the Court ruled that Johnson and all others with cases on direct review should receive the benefit of *Payton*. *Id.* at 562.

The Court later adopted the approach of *Johnson* as a categorical rule: When the Supreme Court adopts a new rule of criminal procedure, including a new rule of Fourth Amendment law, that rule always applies in full force to all cases on direct review. *Griffith v. Kentucky,* 479 U.S. 314, 328 (1987). *See also Powell v. Nevada*, 511 U.S. 79, 84 (1994). In contrast, if a new Fourth Amendment decision is handed down *after* the defendant's conviction is final, the balance of interests implicated by the exclusionary rule dictate that the defendant cannot take advantage of the new Fourth Amendment rule in a habeas corpus action. *Stone v. Powell*, 428 U.S. 465, 493-95 (1976); *Teague v. Lane*, 489 U.S. 288 (1989).

The decision below is plainly in conflict with these Supreme Court precedents. Both retroactivity and the proposed good-faith exception focus on the same question: whether reasonable reliance on the

law at the time the search or seizure occurred excuses application of the Fourth Amendment exclusionary rule. This Court's retroactivity cases answer the question "no" for all cases not yet final when the new decision is handed down. The decision below simply relabels the question "good faith" and changes that answer to "yes." The conflict is clear.

The Court's rejection of reasonable reliance on overruled caselaw as a limitation to the exclusionary rule extends beyond the retroactivity setting. For example, in the famous case of *Katz v. United States,* 389 U.S. 347 (1967), agents investigating unlawful betting placed a monitoring device on a public telephone booth without a warrant to listen in on the suspect's calls. The monitoring was lawful under the then-existing precedents of *Olmstead v. United States,* 277 U.S. 438 (1928), and *Goldman v. United States,* 316 U.S. 129 (1942). In *Katz*, however, the Supreme Court overruled *Olmstead* and *Goldman* and held that such monitoring violated the Fourth Amendment. *See Katz*, 389 U.S. at 353.

Katz next addressed the government's argument that the fruits of surveillance should be admitted because the officers had reasonably relied on then-existing Fourth Amendment precedents. This Court rejected the argument and reversed Katz's conviction: "The Government urges that, because its agents relied upon the decisions in *Olmstead* and *Goldman*, and because they did no more here than they might properly have done with prior judicial sanction, we should retroactively validate their conduct. That we

cannot do." *Id.* at 356. Reliance on then-existing case-law did not avoid suppression of the evidence because there was no such recognized exception to the warrant requirement. *Id.*

The rejection of good-faith reliance on overruled decisions is so deeply embedded in the Supreme Court's decisions that it was explicitly discussed in *Arizona v. Gant*, 129 S. Ct. 1710 (2009), the very case that overruled the precedents Officer Ulman relied on to search the Petitioner's car. In his *Gant* dissent, Justice Alito, joined by Chief Justice Roberts, Justice Kennedy, and Justice Breyer, warned that "the Court's decision will cause the suppression of evidence gathered in many searches carried out in good-faith reliance on well-settled case law." *Gant*, 129 S. Ct. at 1726 (Alito, J., dissenting). Justice Alito recognized the significant practical consequences of *Gant*:

> Many searches – almost certainly including more than a few that figure in cases now on appeal – were conducted in scrupulous reliance on [*Belton*]. It is likely that, on the very day when this opinion is announced, numerous vehicle searches will be conducted in good faith by police officers who were taught the *Belton* rule.

Id. at 1728 (Alito, J., dissenting). Nonetheless, the evidence in such cases would be suppressed. *Id.* at 1726 (Alito, J., dissenting).

The majority opinion in *Gant* did not deny Justice Alito's assessment of the decision's impact. Instead, the Court noted that the impact of *Gant* would be limited in the civil context because "the doctrine of qualified immunity will shield officers from liability for searches conducted in reasonable reliance on that understanding." *Id.* at 1722 n.11. The Court also suggested that the cost of suppression was simply the cost of complying with the Constitution: "The fact that the law enforcement community may view the State's version of the *Belton* rule as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected." *Id.* at 1723.

The exchange between the *Gant* majority and dissent, in which all nine Justices participated, plainly reflects the understanding that the good-faith exception to the exclusionary rule would not apply to reliance on pre-*Gant* caselaw. Notably, the doctrine of qualified immunity in the civil context and *Leon's* good-faith reliance test in the criminal context use an identical legal standard. *See Groh v. Ramirez*, 540 U.S. 551, 565 n.8 (2004). If the members of this Court thought that the good-faith exception might apply, presumably one of the Justices would have said so.

The Court's disposition in *Gant* emphasizes the point. The Court did not remand for further proceedings such as an application of the good-faith exception. Instead, the Court affirmed the Arizona Supreme Court's order suppressing the evidence.

Gant, 129 S. Ct. at 1724. The Tenth Circuit's ruling below that the good-faith exception applies to reliance on pre-*Gant* caselaw therefore conflicts with *Gant* itself. The conflict demands Supreme Court review.

III. THIS IS A RECURRING ISSUE OF NATIONAL IMPORTANCE THAT HAS PERCOLATED FOR OVER TWO DECADES, AND THIS CASE PRESENTS THE IDEAL VEHICLE FOR SUPREME COURT REVIEW.

This case squarely presents a recurring issue of national importance on which the lower courts are divided. The split is undeniable, as is the direct tension between the decision below and this Court's own caselaw. Further percolation would be unhelpful. Over the last twenty years, five circuits and two state Supreme Courts have addressed the question raised by this petition. Those lower court decisions have produced a deep three-way split, and the opinions fully explore each of the possible approaches the Court might adopt. The time has come to decide this issue.

Certiorari is particularly appropriate in this case because the combination of *Herring v. United States* and *Arizona v. Gant* has triggered a flood of litigation in the lower courts on the precise issue raised by this petition. *Herring* made the good-faith exception front-page news, quite literally. *See* Adam Liptak, *Justices Step Closer to Repeal of Evidence Ruling*, N.Y. Times, Jan. 30, 2009, at A1 (discussing the possible future

impact of *Herring*); Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 Green Bag 2d 413, 416 (2009) (describing *Herring* as "one of the most important criminal cases of the year," and arguing that it "effected the biggest change in the exclusionary rule since *Mapp v. Ohio* applied the rule to the states in 1961").

In the months after *Herring*, prosecutors have been unusually eager to make creative arguments that could expand the good-faith exception. *Arizona v. Gant*, handed down on April 21, 2009, has provided the perfect opportunity for such arguments. Because the search technique invalidated in *Gant* was so widely used, litigation considering whether the good-faith exception applies to reliance on pre-*Gant* caselaw is now pending in dozens of state and federal courts around the country. As explained above, two circuits have already ruled on the question, producing the clear split between the decision below (ruling that the good-faith exception applies) and the Ninth Circuit in *Gonzales* (rejecting the exception).

But these two decisions are just the beginning. Many federal district courts and state intermediate courts have reached the issue in recent weeks, with many more on the way. The decisions that have been handed down already are just as divided as the federal courts of appeals. *See, e.g., United States v. Buford*, 623 F. Supp.2d 923, 926-27 (M.D. Tenn. 2009) (rejecting the good-faith exception for *Belton* searches invalidated by *Gant*); *People v. Arnold*, ___ N.E.2d ___, 2009 WL 2661136, at *13 (Ill. App. 2 Dist., Aug.

26, 2009) (same); *United States v. Lopez*, 2009 WL 2840490 (E.D. Ky., Sept. 1 2009) (accepting the good-faith exception for *Belton* searches invalidated by *Gant*); *United States v. Owens*, 2009 WL 2584570 (N.D. Fla., Aug. 20, 2009) (same); *United States v. Allison*, ___ F. Supp.2d ___, 2009 WL 2218693 (S.D. Iowa, July 24, 2009) (same); *United States v. Grote*, 2009 WL 2068023 (E.D. Wash., July 15, 2009) (same). *See also United States v. Deitz*, 577 F.3d 672, 688 (6th Cir. 2009) (holding that reliance on pre-*Gant* caselaw allowing *Belton* searches is not plain error).

In light of the extensive litigation in the lower courts, the principle of sound judicial administration calls for the Court to review this issue now rather than to wait for a future case. This petition involves the first federal circuit court decision on whether the good-faith exception applies to searches incident to arrest permitted before *Arizona v. Gant*. If the Court waits for a future case, dozens of lower courts will continue to spend valuable time and effort briefing and deciding the exact same issue the Court must decide. Lower courts that reach a conclusion contrary to that of the Court's ultimate decision will be forced to go back and start from scratch. Defendants in circuits that recognize a good-faith exception will see their convictions become final. In contrast, granting review in this case will allow lower courts around the country to put their cases on hold and await this Court's much-needed guidance.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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October 1, 2009.

573 F.3d 1037

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARKICE LAVERT McCANE, Defendant-Appellant.	No. 08-6235

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (D.C. NO. 5:07-CR-00286-C-1)

(Filed Jul. 28, 2009)

William H. Campbell, Campbell Law Office, Oklahoma City, Oklahoma, for Defendant-Appellant.

Edward J. Kumiega, Assistant United States Attorney (John C. Richter, United States Attorney, with him on the briefs), Oklahoma City, Oklahoma, for Plaintiff-Appellee.

Before **MURPHY**, **ANDERSON**, and **TYMKOVICH**, Circuit Judges.

MURPHY, Circuit Judge.

I. INTRODUCTION

In April 2007, Defendant-Appellant Markice McCane was stopped for a suspected traffic violation by an Oklahoma City police officer. After determining McCane was driving under a suspended license, the officer arrested McCane, handcuffed him, and placed him in the back seat of the patrol car. The officer then conducted a search of the passenger compartment of the vehicle and discovered a firearm in the pocket of the driver's side door. McCane was charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). McCane filed a motion to suppress the firearm as fruit of an unlawful search. The district court denied the motion, concluding the search was properly undertaken as incident to a lawful arrest. While the case was pending on appeal, the United States Supreme Court issued its decision in *Arizona v. Gant*, 129 S. Ct. 1710 (2009). In *Gant*, the Court concluded a vehicle search is not valid as incident to a lawful arrest when a defendant is stopped for a traffic violation and handcuffed in the back of the patrol car at the time of the search. *Id.* at 1719. In light of *Gant*, the district court erred in concluding the search was valid as incident to a

lawful arrest. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we nevertheless **affirm** the district court's denial of the motion to suppress based upon the good-faith exception to the exclusionary rule.

II. BACKGROUND

On April 18, 2007, Officer Aaron Ulman of the Oklahoma City Police Department was patrolling his precinct when he observed a vehicle traveling eastbound on a four-lane thoroughfare. The vehicle was straddling the center line of the two eastbound lanes. After following the vehicle for approximately three blocks, Officer Ulman decided to conduct a traffic stop based upon his belief the driver was violating state traffic law and his suspicion the driver was intoxicated. After pulling the vehicle over to the side of the road, Officer Ulman approached the vehicle and asked the driver, later identified as McCane, for his license and insurance information. A passenger, Joseph Carr, was also in the vehicle.

After McCane informed him that his license was suspended, Officer Ulman asked McCane to exit the vehicle and accompany him to the patrol car. McCane complied, and Carr remained in the front seat of the vehicle. Upon exiting the vehicle, McCane left the driver's door open, and the door remained open for the duration of the stop. Officer Ulman conducted a pat-down search of McCane and placed him in the back seat of the patrol car. Officer Ulman then conducted a records check, which indicated McCane's

license was suspended and the vehicle was not registered to McCane. At that time, Officer Ulman arrested McCane for driving with a suspended license, placed him in handcuffs, and again placed him in the back seat of the patrol car. After requesting dispatch to contact a wrecker service to tow the vehicle, Officer Ulman asked Carr to exit the vehicle and sit in the back seat of the patrol car along with McCane. Carr did so, and Officer Ulman then searched the passenger compartment of the car.

During the search, Ulman discovered a .25 caliber firearm hidden under a rag in the side pocket of the open door. The firearm was loaded with a magazine containing seven rounds of ammunition. Officer Ulman removed the firearm from the vehicle and took it back to the patrol car in order to secure it. The patrol car was parked directly behind McCane's vehicle. According to Officer Ulman, when McCane saw the firearm he stated, "I forgot that was even there." Officer Ulman then advised McCane of his *Miranda* rights (*Miranda v. Arizona,* 384 U.S. 436 (1966)), and McCane did not make any additional statements. After the vehicle was impounded, Carr was released, and McCane was transported to the police station for booking.

McCane was charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Before the district court, McCane filed motions to suppress the firearm and exclude his alleged inculpatory statement. The district court denied these motions, concluding the statement was

made voluntarily and the search of McCane's vehicle did not violate the Fourth Amendment because it was properly undertaken as a search incident to lawful arrest. Following a jury trial, McCane was found guilty of the charged offense. McCane then appealed to this court alleging: (1) the district court erred in denying his pretrial motions to suppress the evidence stemming from the search of his vehicle; (2) insufficient evidence existed from which to convict him of the offense; and (3) the felon in possession statute at 18 U.S.C. § 922(g)(1) is unconstitutional in light of the Supreme Court's decision in *District of Columbia v. Heller,* 128 S. Ct. 2783 (2008).

While the case was pending before this court, the Supreme Court issued its decision in *Arizona v. Gant.* 129 S. Ct. 1710. On facts almost identical to the facts of this case, the Supreme Court held that the search-incident-to-lawful-arrest exception to the warrant requirement of the Fourth Amendment is not applicable when a defendant has been arrested for a traffic violation and remains handcuffed in the back of a patrol car while the search is conducted. *Id.* at 1719. After noting that lower courts have widely upheld searches "in this precise factual scenario," the Court stated that an officer may "search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" or when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Id.* at 1718-19 (quotations omitted).

The parties agree that, in light of *Gant,* the district court erred in denying the motion to suppress the firearm on the grounds that the search was proper as incident to lawful arrest. The parties disagree, however, as to whether the district court's denial of the motion to suppress can be affirmed on an alternative ground. Thus, the issues now before the court are: (1) whether the district court's denial of the motion to suppress the firearm may be affirmed based upon the good-faith exception to the exclusionary rule or the inevitable discovery doctrine, (2) whether sufficient evidence existed on which to convict McCane, and (3) whether 18 U.S.C. § 922(g) is constitutional.[1]

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[1] McCane makes a number of additional arguments in his opening brief which do not merit further analysis. First, McCane appears to argue that because Officer Ulman was not a credible witness, McCane's alleged inculpatory statement should have been suppressed and the initial traffic stop should not have been upheld. The determination of credibility, however, is within the province of the district court, and it was well within the district court's discretion to credit the testimony of Officer Ulman. *United States v. Kimoana,* 383 F.3d 1215, 1220 (10th Cir. 2004). Second, McCane argues that probable cause, not reasonable suspicion, must exist in order for an officer to conduct a stop for a perceived traffic violation. This argument is foreclosed by circuit precedent. *United States v. Vazquez,* 555 F.3d 923, 928 (10th Cir. 2009) ("A traffic stop is permissible under the Fourth Amendment if the officer has a reasonable articulable suspicion that a traffic violation has occurred or is occurring." (quotation omitted)).

III. DISCUSSION

A. Motion to Suppress

This court may affirm the district court on any basis supported by the record. *Kellogg v. Metro. Life Ins. Co.*, 549 F.3d 818, 825 (10th Cir. 2008). As an alternative ground for affirming the district court's decision to deny the motion to suppress the firearm as fruit of an unlawful search, the government claims that Officer Ulman reasonably relied upon settled pre-*Gant* Tenth Circuit case law, and the good-faith exception to the exclusionary rule should be extended to this search.[2] To prevail on this alternative ground, the government must establish that the search of the vehicle was supported by extant Tenth Circuit precedent and that the principle of deterrence underlying the exclusionary rule is not undermined.

1. Pre-*Gant* Tenth Circuit Precedent

The Supreme Court in *Gant* expressed concern that its precedent, *New York v. Belton*, 453 U.S. 454 (1981), was being generally applied far beyond the underlying justifications for warrantless vehicle searches incident to arrest of a recent occupant, i.e., officer safety and preservation of evidence. *Gant*, 129

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[2] The Supreme Court has indicated that in applying the good-faith exception to the exclusionary rule, "the standard of reasonableness [ ] is an objective one; the standard does not turn on the subjective good faith of individual officers." *Illinois v. Krull*, 480 U.S. 340, 355 (1987).

S. Ct. at 1718-19. It observed that *Belton* "has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." *Id.* at 1718. Tenth Circuit precedent anteceding *Gant* was not an exception.

The decision in *United States v. Humphrey,* 208 F.3d 1190 (10th Cir. 2000), is exemplary of this circuit's precedent and is factually indistinguishable from the instant case. In *Humphrey,* the defendant was stopped for a traffic violation, arrested on the basis of an outstanding warrant, and handcuffed in the patrol car at the time of the search of his vehicle. *See id.* at 1202. The defendant's arguments that neither officer safety nor preservation of evidence were in play were to no avail. *Id.* This court held the search was proper "without regard to the fact that the search occurred after Defendant had been restrained and without regard to the nature of the offense for which he was arrested." *Id.* (citation omitted). Other circuit opinions are consistent with *Humphrey.*[3]

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[3] Contrary to McCane's assertion, the decision in *United States v. Edwards,* 242 F.3d 928, 937-38 (10th Cir. 2001), does not hold otherwise. In *Edwards,* this court concluded a search could not be justified as incident to lawful arrest because the arrestee had not been in the vehicle, and thus the contents of the vehicle could not have been in his immediate control, during the relevant time period preceding the arrest. *Id.* at 938. The court explained that because the defendant was 100-150 feet away from the car at the time he was arrested, there was no

(Continued on following page)

United States v. Brothers, 438 F.3d 1068, 1073 (10th Cir. 2006) (upholding search undertaken incident to lawful arrest after the defendant had been restrained, but before the defendant was removed from the scene of the arrest)[4]; *United States v. Cotton,* 751 F.2d 1146, 1148-49 (10th Cir. 1985); *United States v. Murphy,* 221 Fed. Appx. 715, 721-22 (10th Cir. 2007) (unpublished disposition). The search in this case was wholly consistent with and supported by this court's precedent prior to *Gant.*

2. Application of the Good-Faith Exception to the Exclusionary Rule

"The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and

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evidence that he had control over the vehicle immediately prior to or at the time of his arrest. *Id.* The time for a proper search incident to arrest had passed by the time he was handcuffed and placed in the police car 100-150 feet away from his vehicle. *Id.* The instant case is different: there is no dispute McCane was in his car during the relevant time period preceding the stop and arrest.

[4] In *United States v. Lugo,* the defendant was in a moving police car en route to the police station at the time the vehicle was searched. 978 F.2d 631, 635 (10th Cir. 1992). Because the search occurred *after the defendant had left the scene,* it was too remote in time and place from the arrest to constitute a search incident to lawful arrest. *Id. See also United States v. Dennison,* 410 F.3d 1203, 1209 (10th Cir. 2005). In the instant case, there is no dispute McCane was still at the scene of the arrest when the search occurred.

seizures, but contains no provision expressly precluding the use of evidence obtained in violation of its commands." *Herring v. United States,* 129 S. Ct. 695, 699 (2009) (quotations omitted). There is, however, the judicially created exclusionary rule which, when applied, excludes evidence obtained in violation of the Fourth Amendment from being used at trial. *Id.* The exclusionary "rule is designed to safeguard Fourth Amendment rights generally through its deterrent effect." *Id.* (quotation omitted). "The fact that a Fourth Amendment violation occurred – i.e., that a search or arrest was unreasonable – does not necessarily mean that the exclusionary rule applies." *Id.* at 700.

"The exclusionary rule is not an individual right and applies only where it results in appreciable deterrence." *Id.* (quotations omitted). Because the purpose of the exclusionary rule is to deter police misconduct, *United States v. Leon,* 468 U.S. 897, 906 (1984), in determining whether to apply the rule the court is to weigh the benefits of the resulting deterrence against the costs of applying the rule. *Herring,* 129 S. Ct. at 700. "The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free – something that offends basic concepts of the criminal justice system." *Id.* at 701 (quotation omitted). Consequently, "[t]he rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging its application." *Id.* (quotation omitted).

Various principles have been established to limit the application of the exclusionary rule. *Id.* at 700. One such principle is the good-faith exception. *Id.* at 701. In *Leon,* the Supreme Court established the good-faith exception to the exclusionary rule, declining to apply the exclusionary rule when police reasonably and in good faith relied upon a warrant subsequently declared invalid. 468 U.S. at 922. The Court, relying on the deterrent purpose of the exclusionary rule, determined it was improper to apply the rule in this context, explaining:

> First, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. Second, there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion. [] Third, and most important, we discern no basis, and are offered none, for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate. . . . Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them.

Id. at 916-17 (footnote omitted). The Court concluded the exclusionary rule "cannot be expected, and should

not be applied, to deter objectively reasonable law enforcement activity." *Id.* at 919.

In *Illinois v. Krull,* the Court extended the good-faith exception to warrantless administrative searches performed in reliance upon a statute later declared unconstitutional. 480 U.S. 340, 349-53 (1987). The Court first explained that applying the exclusionary rule in this situation would have little deterrent effect on the officer's actions, stating:

> Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written. To paraphrase the Court's comment in *Leon:* Penalizing the officer for the legislature's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.

Id. at 349-50 (quotation omitted). The Court then noted that the exclusionary rule was aimed at deterring misconduct on the part of police, not legislators. *Id.* at 350. To the extent consideration of the deterrent effect upon legislators was appropriate, however, the initial inquiry was whether there was "evidence to suggest that legislators are inclined to ignore or subvert the Fourth Amendment." *Id.*

(quotation omitted). In answering this question in the negative, the Court stated that, "[a]lthough legislators are not neutral judicial officers, as are judges and magistrates, neither are they adjuncts to the law enforcement team." *Id.* at 350-51 (citation and quotation omitted). In enacting laws to carry out the criminal justice system, "legislators' deliberations of necessity are significantly different from the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime." *Id.* at 351 (quotation omitted). Finally, the Court noted that even if it were to conclude that legislators were distinguishable from officers of the judicial system, there was "no reason to believe that applying the exclusionary rule will have [a deterrent] effect. Legislators enact statutes for broad, programmatic purposes, not for the purpose of procuring evidence in particular criminal investigations." *Id.* at 352.

The Court next extended the good-faith exception to police reliance upon mistaken information in a court's database indicating an arrest warrant was outstanding. *Arizona v. Evans,* 514 U.S. 1, 14-16 (1995). In *Evans,* the Court explained that the mistake of a judicial employee would not justify exclusion of evidence for three reasons: (1) the exclusionary rule was established to deter *police* misconduct, not the conduct of court employees; (2) there was no evidence court employees were likely to "ignore or subvert the Fourth Amendment"; and (3) there was no basis for believing application of the exclusionary rule would deter the conduct at issue since "court clerks are not

adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime, they have no stake in the outcome of particular criminal prosecutions." *Id.* at 14-15 (citation omitted).

Finally, in its recent good-faith decision, *Herring,* the Court extended the good-faith exception to police reliance upon the negligent mistake of a fellow law enforcement employee, as opposed to a neutral third party. 129 S. Ct. at 704. In *Herring,* the court applied the good-faith exception where, in making an arrest, police relied upon a record-keeping error in the police computer database indicating there was an active warrant for the arrestee. *Id.* at 698, 702-04. In discussing the principles of the exclusionary rule, the Court stated that "[t]he extent to which the exclusionary rule is justified by [] deterrence principles varies with the culpability of the law enforcement conduct." *Id.* at 701. Thus, "assessment of the flagrancy of the police misconduct constitutes an important step in the calculus of applying the exclusionary rule." *Id.* (quotation omitted).

The Court went on to explain that "evidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Id.* (quotations omitted). As such, "the [past] abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional." *Id.* at 702. The Court concluded the conduct at issue did not rise to this level, clarifying that the

good-faith inquiry "is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances." *Id.* at 703 (quotations omitted).

Two inseparable principles have emerged from the Supreme Court cases and each builds upon the underlying purpose of the exclusionary rule: deterrence. First, the exclusionary rule seeks to deter objectively unreasonable police conduct, i.e., conduct which an officer knows or should know violates the Fourth Amendment. *See, e.g., Herring,* 129 S. Ct. at 701-04; *Krull,* 480 U.S. at 348-49. Second, the purpose of the exclusionary rule is to deter misconduct by law enforcement officers, not other entities, and even if it was appropriate to consider the deterrent effect of the exclusionary rule on other institutions, there would be no significant deterrent effect in excluding evidence based upon the mistakes of those uninvolved in or attenuated from law enforcement. *See, e.g., Evans,* 514 U.S. at 14-15; *Krull,* 480 U.S. at 351-52; *Leon,* 468 U.S. at 916-17. Based upon these principles, we agree with the government that it would be proper for this court to apply the good-faith exception to a search justified under the settled case law of a United States Court of Appeals, but later rendered unconstitutional by a Supreme Court decision.

Just as there is no misconduct on the part of a law enforcement officer who reasonably relies upon the mistake of a court employee in entering data,

Evans, 514 U.S. at 15, or the mistake of a legislature in passing a statute later determined to be unconstitutional, *Krull,* 480 U.S. at 349-50, a police officer who undertakes a search in reasonable reliance upon the settled case law of a United States Court of Appeals, even though the search is later deemed invalid by Supreme Court decision, has not engaged in misconduct.[5] The refrain in *Leon* and the succession of Supreme Court good-faith cases is that the exclusionary rule should not be applied to "objectively reasonable law enforcement activity." 486 U.S. at 919. Relying upon the settled case law of a United States Court of Appeals certainly qualifies as objectively reasonable law enforcement behavior.

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[5] McCane argues the retroactivity rule announced in *Griffith v. Kentucky,* 479 U.S. 314, 322-23 (1987), requires application of the Supreme Court's holding in *Gant* to this case. The issue before us, however, is not whether the Court's ruling in *Gant* applies to this case, it is instead a question of the proper remedy upon application of *Gant* to this case. In *Leon,* the Supreme Court considered the tension between the retroactive application of Fourth Amendment decisions to pending cases and the good-faith exception to the exclusionary rule, stating that retroactivity in this context "has been assessed largely in terms of the contribution retroactivity might make to the deterrence of police misconduct." 468 U.S. at 897, 912-13. The lack of deterrence likely to result from excluding evidence from searches done in good-faith reliance upon settled circuit precedent indicates the good-faith exception should apply in this context. *See Krull,* 480 U.S. at 360 (declining to apply a court decision declaring a statute unconstitutional to a case pending at the time the decision was rendered and instead applying the good-faith exception to the exclusionary rule because the officer reasonably relied upon the statute in conducting the search).

The Supreme Court's line of good-faith cases clearly indicates that the reach of the exclusionary rule does not extend beyond police conduct to punish the mistakes of others, be they judicial officers or employees, or even legislators. *Evans,* 514 U.S. at 14 ("[T]he exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees."); *Krull,* 480 U.S. at 350 ("We noted in *Leon* as an initial matter that the exclusionary rule was aimed at deterring police misconduct. Thus, legislators, like judicial officers, are not the focus of the rule." (citation omitted)); *Leon,* 468 U.S. at 916 ("[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates."). In the case of judicial officers, the Supreme Court has stated that "there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion." *Leon,* 468 U.S. at 916. Thus there is no basis for believing that excluding evidence resulting from an error of the court will "have a significant deterrent effect on the issuing judge[s]." *Id.* Courts are neutral arbiters charged with interpreting the law, and have "no stake in the outcome of particular criminal prosecutions." *Id.* at 917. Consequently, excluding evidence based on judicial error would serve no deterrent purpose. The Supreme Court has consistently relied upon the deterrent purpose of the exclusionary rule in deciding the scope of the good-faith exception. The Court has declined to apply the

exclusionary rule when no deterrent effect would result from its application. Consistent with this practice, this court declines to apply the exclusionary rule when law enforcement officers act in objectively reasonable reliance upon the settled case law of a United States Court of Appeals.[6] The good-faith exception to the exclusionary rule applies in this case. The district court therefore properly denied the motion to suppress.[7]

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[6] We note that *in United States v. 15324 County Highway E.*, the Seventh Circuit declined to uphold a search based upon good-faith reliance on Seventh Circuit precedent later overturned by a Supreme Court decision, and instead upheld the search based upon the officer's good-faith reliance on a validly issued search warrant. 332 F.3d 1070, 1075-76 (7th Cir. 2003). In declining to extend the good-faith rule to reliance on circuit case law, the court reasoned that "[s]uch expansion of the good-faith exception would have undesirable, unintended consequences, principal among them being an implicit invitation to officers in the field to engage in the tasks – better left to the judiciary and members of the bar more generally – of legal research and analysis." *Id.* at 1076. In the instant case, the Tenth Circuit jurisprudence supporting the search was settled. Thus, there was no risk that law enforcement officers would engage in the type of complex legal research and analysis better left to the judiciary and members of the bar.

[7] Because we uphold the search as valid under the good-faith doctrine, we need not decide whether the denial of McCane's motion to suppress could be affirmed based upon the inevitable discovery doctrine.

B. Sufficiency of the Evidence

This court reviews de novo the sufficiency of the evidence, "ask[ing] only whether taking the evidence – both direct and circumstantial, together with the reasonable inferences to be drawn therefrom – in the light most favorable to the government, a reasonable jury could find the defendant guilty beyond a reasonable doubt." *United States v. Brown,* 400 F.3d 1242, 1247 (10th Cir. 2005) (quotation omitted). This court does not "assess the credibility of witnesses or weigh conflicting evidence . . . [and] may reverse only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (quotation omitted). "In order to obtain a conviction against [a defendant] under § 922(g), the government was required to prove that [the defendant] had previously been convicted of a felony, [the defendant] thereafter knowingly possessed a firearm, and such possession was in or affected interstate commerce." *United States v. Michel,* 446 F.3d 1122, 1128 (10th Cir. 2006).

McCane claims there was insufficient evidence from which the jury could find he had possession of the firearm. Possession of a firearm for purposes of 18 U.S.C. § 922(g)(1) can be either actual or constructive. *Id.* "Actual possession exists when a person has direct physical control over a firearm at a given time." *United States v. Jameson,* 478 F.3d 1204, 1209 (10th Cir. 2007). "Constructive possession exists when a person knowingly holds the power and ability to

exercise dominion and control over a firearm." *Id.* (quotation omitted).

"When a defendant has exclusive possession of the premises on which a firearm is found, knowledge, dominion, and control can be properly inferred because of the exclusive possession alone." *Id.* However, "[i]n cases of joint occupancy, where the government seeks to prove constructive possession by circumstantial evidence, it must present evidence to show some connection or nexus between the defendant and the firearm." *Michel,* 446 F.3d at 1128 (quotation omitted). "Proximity alone [] is insufficient to establish knowledge and access to (and dominion and control over) a firearm in a joint occupancy case." *Jameson,* 478 F.3d at 1209. "But when combined with other evidence in the case linking the defendant to the firearm, proximity is material and probative evidence that may be considered in deciding whether a defendant had knowledge of and access to (and dominion and control over) the [firearm]." *Id.* "[A]n inference of constructive possession is reasonable if the conclusion flows from logical and probabilistic reasoning." *Michel,* 446 F.3d at 1128-29 (quotation omitted).

Officer Ulman testified that the firearm was located in the side pocket of the driver's door, "within inches of reach [of McCane] whenever the door [was] shut." In addition to his testimony regarding the proximity of the firearm to McCane, Officer Ulman testified that upon seeing the firearm, McCane stated, "I forgot that was even there." While McCane

argues Officer Ulman was not a credible witness because he was "trying to save his felony arrest and obtain a conviction predicated on his actions," it was well within the discretion of the jury to credit Officer Ulman's testimony and this court will not assess the credibility of a witness on appeal. *United States v. Winder,* 557 F.3d 1129, 1137 (10th Cir. 2009). McCane's statement, together with the proximity of the firearm, supports the conclusion that McCane had knowledge of the firearm as well as the power and ability to exercise dominion and control over it. *See United States v. Hooks,* 551 F.3d 1205, 1213 (10th Cir. 2009) (concluding defendant's inculpatory statements along with other evidence regarding his earlier behavior and proximity to the firearm provided sufficient evidence from which a jury could find constructive possession of a firearm discovered beside a road). Thus, there existed sufficient evidence from which the jury could infer McCane's constructive possession of the firearm.

C. The Constitutionality of 18 U.S.C. § 922(g)

McCane first argues that in light of the Supreme Court's decision in *Heller,* in which the Court held that the Second Amendment provides an individual with a right to possess and use a handgun for lawful purposes within the home, 128 S. Ct. at 2822, § 922(g) violates the Second Amendment. The Supreme Court, however, explicitly stated in *Heller* that "nothing in our opinion should be taken to cast doubt on long-standing prohibitions on the possession of firearms by

felons." 128 S. Ct. at 2816-17; *see also United States v. Anderson,* 559 F.3d 348, 352 & n.6 (5th Cir. 2009) (rejecting the argument that § 922(g) is unconstitutional in light of *Heller*).

McCane next argues § 922(g) violates the Commerce Clause where, as here, the crime's only connection to interstate commerce is the firearm's crossing of state lines. This argument also lacks merit, as it has been explicitly rejected by this court. *See, e.g., United States v. Urbano,* 563 F.3d 1150, 1154 (10th Cir. 2009) (rejecting Commerce Clause challenge to § 922(g) based upon the alleged insufficient connection to interstate commerce and stating "if a firearm has traveled across state lines, the minimal nexus with interstate commerce is met and the statute can be constitutionally applied"); *United States v. Bolton,* 68 F.3d 396, 400 (10th Cir. 1995) (concluding "[§] 922(g)'s requirement that the firearm have been, at some time, in interstate commerce is sufficient to establish its constitutionality under the Commerce Clause" (quotation omitted)). Thus, we reject each of McCane's arguments challenging the constitutionality of § 922(g).

IV. CONCLUSION

For the reasons discussed above, we **affirm** the decision of the district court[8].

Tymkovich, J., concurring.

I join in Judge Murphy's cogent opinion, but write separately regarding certain issues raised by our Second Amendment holding.

District of Columbia v. Heller instructs that it not be taken "to cast doubt on longstanding prohibitions on the possession of firearms by felons." 128 S. Ct. 2783, 2816-17 (2008). This instruction, as McCane points out, is dictum. But Supreme Court dicta binds us "almost as firmly as . . . the Court's outright holdings." *Surefoot LC v. Sure Foot Corp.*, 531 F.3d 1236, 1243 (10th Cir. 2008) (quoting *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996)). This is particularly so where, as here, the dictum is recent and not enfeebled by later statements. *See id.*; *see also* Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 Hastings L.J. 1371, 1372 (2009) ("Although [*Heller*'s] exceptions are arguably dicta, they are dicta of the strongest sort."). I therefore concur with the majority in rejecting McCane's Second Amendment challenge.

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[8] Appellant's motion to strike Appellee's Notice of Supplemental Authority is denied.

I write separately, though, for two reasons. The first is to note, given the undeveloped history of felon dispossession laws, the possible tension between *Heller*'s dictum and its underlying holding. The second reason is to express concern that the dictum inhibits lower courts from exploring the contours of *Heller* and its application to firearm restrictions.

My first point is that the felon dispossession dictum may lack the "longstanding" historical basis that *Heller* ascribes to it. Indeed, the scope of what *Heller* describes as "longstanding prohibitions on the possession of firearms by felons," 128 S. Ct. at 2816-17, is far from clear. To be sure, some sources would support the proposition. *See* Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 Okla. L. Rev. 65, 96 (1983) ("Colonial and English societies of the eighteenth century . . . excluded . . . felons [from possessing firearms]."); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 203, 266 (1983) ("Founders [did not] consider felons within the common law right to arms.").

But more recent authorities have *not* found evidence of longstanding dispossession laws. On the contrary, a number have specifically argued such laws did not exist and have questioned the sources relied upon by the earlier authorities. *See, e.g.*, Larson, *supra*, at 1374 (finding Kates's evidence of longstanding felon dispossession "surprisingly thin"); C. Kevin Marshall, *Why Can't Martha Stewart Have a*

Gun?, 32 Harv. J.L. & Pub. Pol'y 695, 709-10, 714 (2009) (challenging the evidence cited by both Dowlut and Kates).[1] Instead, they assert, the weight of historical evidence suggests felon dispossession laws are creatures of the twentieth – rather than the eighteenth – century. *See, e.g.*, Marshall, *supra*, at 698-713 (comprehensively reviewing the history of state and federal dispossession laws); Larson, *supra*, at 1374 ("[S]o far as I can determine, no colonial or state law in eighteenth-century America formally restricted the ability of felons to own firearms."); Adam Winkler, Heller's *Catch 22*, 56 UCLA L. Rev. 1551, 1561, 1563 (2009) (same). Together these authorities cast doubt on a categorical approach to felon dispossession laws.

This uncertain historical evidence is problematic in light of *Heller*'s Second Amendment interpretation. Central to the Court's holding are a detailed textual analysis and a comprehensive review of the Second Amendment's meaning at the time of its adoption. *Heller*, 128 S. Ct. at 2788-816. After conducting this analysis and review, *Heller* concludes the right "to keep and bear arms" is a corollary to the individual right of self-defense. *E.g.*, *id.* at 2817 ("[T]he inherent

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[1] While Mr. Kates does not address this evidence specifically, he maintains "there is ample historical support for excluding [felons] from the right to arms: Nations which accepted the right to arms invariably extended that right only to virtuous citizens; and at common law felons were 'civilly dead,' having lost all rights including the right to possess property of any kind." Don B. Kates, *A Modern Historiography of the Second Amendment*, 56 UCLA L. Rev. 1211, 1231 n.100 (2009).

right of self-defense has been central to the Second Amendment right."). At the "core" of the Second Amendment right, the Court found, is self-defense in the home. *Id.* at 2818.

Knowing the meaning of the Second Amendment right and having identified its individual nature, the issue becomes what limits the government may place on the right. Indeed, this is where the Second Amendment rubber meets the road. The restrictive firearm ownership and licensing laws at issue in *Heller* violated the right, the Court found. *Id.* at 2817-21. But what about other laws? For example, the broad scope of 18 U.S.C. § 922(g)(1) – which *permanently* disqualifies *all* felons from possessing firearms – would conflict with the "core" self-defense right embodied in the Second Amendment. Non-violent felons, for example, certainly have the same right to self-defense in their homes as non-felons. The validity of § 922(g)(1) was not at issue in *Heller,* so presumably the lower courts would be left to sort out this restriction – as well as other restrictions – and to wrestle with any complexities in applying *Heller.* But the issue was not really left to the lower courts.

In what could be described as the opinion's *deus ex machina* dicta, *Heller* simply declared that nothing in it "cast[s] doubt on longstanding prohibitions on the possession of firearms by felons" or various other gun control laws. 128 S. Ct. at 2816-17. And that was it. These provisions, and the various regulations they encompassed, were supported without any explanation of how they would fare in light of the Second

Amendment's original meaning. *See id.* at 2827 (Stevens, J., dissenting); *id.* at 2869-70 (Breyer, J., dissenting).[2] The reason the Court inserted these exceptions is unclear. Given the uncertain pedigree of felon dispossession laws, though, the dictum sanctioning their application while simultaneously sidestepping the Second Amendment's original meaning is odd. One wonders, at least with regard to felon dispossession, whether the *Heller* dictum has swallowed the *Heller* rule.

Heller's felon dispossession dictum is particularly noteworthy considering the scope of the § 922(g)(1) ban. The statute prohibits firearm possession by any person convicted of a felony, irrespective of the nature of the felony, the length of time elapsed since the felony conviction, and the treatment of the felony by the state in which the felon resides. Every individual right has exceptions, of course, and the application of

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[2] In one sense, *Heller* did overturn Tenth Circuit case law on this issue. Previously, we upheld the felon-in-possession statute against Second Amendment attack under a collective-rights theory – i.e., that felons have no right to possess firearms that are not reasonably connected to military service. *See, e.g., United States v. Baer,* 235 F.3d 561, 564 (10th Cir. 2000) (holding that the felon-in-possession statute does not violate the Second Amendment "absent evidence that [the firearms in question] in any way affect the maintenance of a well regulated militia"); *see generally* David B. Kopel, *The Second Amendment in the Tenth Circuit: Three Decades of (Mostly) Harmless Error,* 86 Denv. U. L. Rev. 901 (2009). The *Heller* dictum, however, affirms the ultimate disposition – i.e., that the Second Amendment does not protect a felon's right to possess firearms.

§ 922(g) to a violent felon such as Mr. McCane would appear appropriate under any Second Amendment reading. After all, felons lose out on fundamental rights such as voting and serving on juries, and face discrimination that need only survive rational basis review. The question may be less clear, however, where the underlying felony is non-violent, such as financial fraud, perjury, or misleading federal investigators. But § 922(g)(1) encompasses these (and other) non-violent felons as well, permanently restricting their Second Amendment right to self-defense.

This brings me to my second point. The Court's summary treatment of felon dispossession in dictum forecloses the possibility of a more sophisticated interpretation of § 922(g)(1)'s scope. Applying *Heller*'s individual right holding to various regulations would be complicated, and it is of course possible (if not probable) that different courts would articulate different standards. Already a number of commentators have considered and proposed approaches to the existing gun laws and the proper level of constitutional scrutiny. *See, e.g.,* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda,* 56 UCLA L. Rev. 1443 (2009); Marshall, *supra,* at 728-31; Larson, *supra,* at 1379-1382. But the existence of on-point dicta regarding various regulations short-circuits at least some of the analysis and refinement that would otherwise take place in the lower courts. In this case, for example, we need not address the standard of review applicable to gun dispossession

laws – strict scrutiny, intermediate, rational basis, or something else – or the examination of the governmental interests in light of the standard of review.[3]

Rather than seriously wrestling with how to apply this new Second Amendment rule, therefore, courts will continue to simply reference the applicable *Heller* dictum and move on. And in light of the Supreme Court's clear direction, this is perhaps how it should be. After all, "our job as a federal appellate court is to follow the Supreme Court's directions, not pick and choose among them as if ordering from a menu." *Surefoot LC,* 531 F.3d at 1243. I nevertheless wonder whether Second Amendment law would have been better served if the regulations *Heller* addressed in dicta had been left to later cases.

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[3] By my count, at least six other circuits have rejected post-*Heller* challenges to the 18 U.S.C. § 922(g)(1) felon dispossession statute. Almost all these decisions cursorily cite the *Heller* dictum, and almost all are unpublished. *See, e.g., United States v. Anderson,* 559 F.3d 348, 352 n.6 (5th Cir. 2009); *United States v. Brye,* 318 F. App'x 878, 879 (11th Cir. 2009) (unpublished); *United States v. Frazier,* 314 F. App'x 801, 807 (6th Cir. 2008) (unpublished); *United States v. Brunson,* 292 F. App'x 259, 261 (4th Cir. 2008) (unpublished); *United States v. Gilbert,* 286 F. App'x 383, 386 (9th Cir. 2008) (unpublished); *United States v. Irish,* 285 F. App'x 326, 327 (8th Cir. 2008) (unpublished).

2008 WL 2740926

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	No. CR-07-286-C
MARKICE LAVERT McCANE,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

(Filed Jul. 10, 2008)

Defendant is charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Before the Court are Defendant's motion to exclude statements (*see* Dkt. Nos. 16 & 19) and motion to suppress evidence (*see* Dkt. Nos. 17 & 18), and the government's response to each (*see* Dkt. Nos. 25 & 26). On July 8, 2008, the Court conducted an evidentiary hearing on these motions. As announced in open court on that date, Defendant's motions are denied.

I. BACKGROUND

Officer Aaron Ulman of the Oklahoma City Police Department ("OCPD") testified that at approximately 9:30 p.m. on April 18, 2007, he observed Defendant driving a car that was over the marked lane line for approximately three blocks on N.E. 23rd Street in Oklahoma City. When Officer Ulman pulled

Defendant over by activating his emergency lights, Defendant stated that his driver's license was suspended. The officer then requested that Defendant sit in the back of the OCPD patrol car. Officer Ulman then verified Defendant's license status and placed Defendant under arrest for driving with a suspended license. The passenger from Defendant's car also was placed in the back seat of the patrol car.

Officer Ulman then searched the car that Defendant had been driving. In a pocket or compartment on the open driver's-side door, he found a .25 caliber pistol, covered or wrapped by a rag, with seven rounds of ammunition in the magazine. As Officer Ulman returned to the patrol car carrying the gun in order to secure it, Defendant stated, "I forgot that was even there." Officer Ulman then read Defendant his *Miranda*[1] warnings. Defendant said that he understood his rights, but he refused to waive his right to counsel and to talk to the officer about the incident. Officer Ulman ultimately issued citations to Defendant for driving under suspension and for straddling lane lines.

II. DISCUSSION

A. Motion to Exclude Statements

Defendant requested a hearing pursuant to *Jackson v. Denno*[2] to determine the voluntariness of

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] 378 U.S. 386 (1964).

the statement made during the events of April 18, 2007, i.e., "I forgot that was even there." According to Defendant, the statement was not freely, voluntarily, or knowingly made because Defendant was subjected to psychological coercion while in custody. In the alternative, Defendant argues that any such statement should be excluded as fruit of the poisonous tree from a traffic stop that violated the Fourth Amendment.[3]

The government concedes that Defendant was in custody from the time that he was arrested, and thus he was in custody when he made the incriminating statement. The government asserts, however, that Defendant's in-custody, pre-*Miranda* statement was voluntary under the totality of the circumstances and that Defendant was not being interrogated. The government argues that Defendant, a middle-aged, multi-convicted felon and former gang member, realized that he could not "unring the bell" of his reflexive, inculpatory remark and thus refused to talk to an officer after receiving his *Miranda* warnings.

The Supreme Court has explained that the government bears the burden of proving that Defendant's statement was voluntarily made:

> [W]hen a confession challenged as involuntary is sought to be used against a criminal defendant at his trial, he is entitled to a

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[3] Defendant's Fourth Amendment argument is discussed below in the context of his motion to suppress evidence.

> reliable and clear-cut determination that the confession was in fact voluntarily rendered. Thus, the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary.

Lego v. Twomey, 404 U.S. 477, 489 (1972).

The Tenth Circuit has set forth the factors to be considered in determining the voluntariness of a statement:

> Incriminating statements obtained by government acts, threats, or promises that permit the defendant's will to be overborne run afoul of the Fifth Amendment and are inadmissible at trial as evidence of guilt. In determining whether a particular confession is coerced, we consider the following factors: (1) the age, intelligence, and education of the defendant; (2) the length of the detention; (3) the length and nature of the questioning; (4) whether the defendant was advised of her constitutional rights; and (5) whether the defendant was subjected to physical punishment. The determination of voluntariness is based on the totality-of-the-circumstances; none of the single factors listed above is determinative. Accordingly, this court must be mindful of all of the circumstances surrounding a defendant's interrogation, including the particular defendant's characteristics.

United States v. Glover, 104 F.3d 1570, 1579 (10th Cir. 1997) (citations omitted). The Fifth Amendment does

not preclude the admission of volunteered statements that are freely given. *United States v. Muniz,* 1 F.3d 1018, 1022 (10th Cir. 1993) (*citing Miranda,* 384 U.S. at 478). "If a person voluntarily speaks without interrogation by an officer, the Fifth Amendment's protection is not at issue, and the statements are admissible. . . . The test is whether the person's will was overcome, or whether the statement was freely made." *Id.*

Having heard and considered the parties' evidence, it is clear that the government has met its burden of showing that Defendant's statement was voluntary. Officer Ulman offered credible testimony, essentially unrefuted by Defendant, that Defendant spontaneously uttered this statement in the absence of questioning by any officials. Under the totality of the circumstances, Defendant's statement was not the result of coercion or interrogation. Defendant freely gave this statement and thus its admission is not precluded by the Fifth Amendment, although its utterance preceded Defendant's *Miranda* warnings. *See Muniz,* 1 F.3d at 1022.

B. Motion to Suppress

The ordinary remedy for a Fourth Amendment violation is suppression of the evidence obtained during the illegal conduct. *See United States v. Olivares-Rangel,* 458 F.3d 1104, 1108 (10th Cir. 2006). In addition, however, "a defendant may also suppress any other evidence deemed to be 'fruit of the

poisonous tree,' (*i.e.*, evidence discovered as a direct result of the unlawful activity), by showing the requisite factual nexus between the illegality and the challenged evidence." *Id.* at 1108-09.

Defendant moves to suppress all evidence against him, including the gun and ammunition, under the fruit-of-the-poisonous-tree doctrine. According to Defendant, the traffic stop of his car on April 18, 2007, was a "poisonous tree," unsupported by any traffic infraction and thus violative of the Fourth Amendment. He asserts that the evidence seized is therefore inadmissible, tainted "fruit."

1. Initial Stop

Traffic stops are analyzed under the principles pertaining to investigative detentions set forth in *Terry v. Ohio,* 392 U.S. 1 (1968):

> To determine the reasonableness of an investigative detention, we make a dual inquiry, asking first whether the officer's action was justified at its inception, and second whether it was reasonably related in scope to the circumstances which justified the interference in the first place.
>
> . . . .
>
> . . . [A] traffic stop is valid under the Fourth Amendment if the stop is based on an observed traffic violation or if the police officer has reasonable articulable suspicion that a traffic or equipment violation has

> occurred or is occurring.... It is ... irrelevant that the officer may have had other subjective motives for stopping the vehicle. Our sole inquiry is whether this particular officer had reasonable suspicion that this particular motorist violated "any one of the multitude of applicable traffic and equipment regulations" of the jurisdiction.

United States v. Botero-Ospina, 71 F.3d 783, 786, 787 (10th Cir. 1995) (internal quotation marks and footnote omitted) (*quoting Delaware v. Prouse,* 440 U.S. 648, 661 (1979)).

Defendant asserted in his brief that N.E. 23rd Street east of Martin Luther King Boulevard was undergoing extensive maintenance at the time of his arrest, such that the lane position of every driver was affected and the road condition was very poor, especially on the south side of the eastbound curb line. The Court finds, however, that Officer Ulman's contradictory testimony is credible. Officer Ulman, who has extensive experience with the area of Oklahoma City where Defendant was pulled over, testified that while currently there are road construction zones on N.E. 23rd Street, there was not construction underway in this area on the night of April 18, 2007, that would have necessitated Defendant driving across the lane line for three blocks.

Having considered all of the circumstances of the night of April 18, 2007, it is clear that Officer Ulman had an objectively reasonable, articulable suspicion to

undertake a traffic stop. In *Botero-Ospina,* the Tenth Circuit upheld a traffic stop where the officer had observed a car swerve from the outer lane, straddle the center line, and then swerve back to the outside lane on a stretch of highway. 71 F.3d at 788. Similarly, Officer Ulman reasonably believed that Defendant was violating city traffic laws with a continuing lane violation that prevented other cars from passing. *See also United States v. Zabalza,* 346 F.3d 1255, 1257-59 (10th Cir. 2003) (concluding that an initial traffic stop was reasonable under the Fourth Amendment where defendant's vehicle had crossed over the center line twice). In addition, Officer Ulman's observations of Defendant "were sufficient to create a reasonable suspicion that [Defendant] might be sleepy or impaired, and could present a risk of harm to himself and others." *Id.* at 1258 (internal quotation marks omitted). Moreover, even if Officer Ulman had been mistaken in his belief Defendant was violating city traffic ordinances, an officer's "reasonable suspicion may be supported by an 'objectively reasonable' good faith belief even if premised on factual error." *United States v. Vercher,* 358 F.3d 1257, 1261 (10th Cir. 2004).

Thus, because the underlying traffic stop did not violate the Fourth Amendment and there was no primary illegality, the admission of evidence seized as a result is not prohibited by the fruit-of-the-poisonous-tree doctrine.

2. Search of Automobile

The warrantless search of the compartment on the driver's-side door of the car that Defendant had been driving did not violate the Fourth Amendment, as it was a search incident to lawful arrest ("SILA"). Because Officer Ulman validly arrested Defendant, the longstanding SILA exception applies to the search of Defendant's vehicle immediately thereafter. After someone is arrested, the government is entitled to a contemporaneous reasonable search which may extend to objects under the arrestee's immediate control. *Malone v. Crouse,* 380 F.2d 741, 744 (10th Cir. 1967). Under the SILA exception, officers may search the contents of any containers found within an arrested defendant's vehicle as well as the passenger compartment. *New York v. Belton,* 453 U.S. 454, 460-61 (1981).

When Officer Ulman pulled the car over, Defendant had been sitting in the driver's seat, and the driver's side door remained swung open after Defendant was placed in the back seat of the OCPD patrol car. Officers may justifiably rely on the SILA exception even when the arrestee has been restrained. *See, e.g., United States v. Brothers,* 438 F.3d 1068, 1073 (10th Cir. 2006) (holding that the *Belton* rule applied when the search was conducted within a few minutes of the defendant's lawful arrest and the defendant had not yet been removed from the

scene); *United St* *l States v. Cotton*, 751 F.2d 1146, 1148-49 (10th Cir. 1985 985) (same).[4]

III. CONCLUSIO USION

For the reas reasons set forth herein, Defendant's motion to exclud clude (Dkt. No. 16) and Defendant's motion to suppres press (Dkt. No. 17) are DENIED.

IT IS SO ORI ORDERED this 10th day of July, 2008.

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
United States District Judge

[4] Defendant mak makes an additional argument that the car – which was not owned wned by Defendant – should have been released to his passenger rath rather than impounded by OCPD. OCPD claims that the impoundme dment took place according to its usual policy. Because the disputed puted evidence was lawfully found pursuant to SILA rather than an n an inventory search, *see, e.g., United States v. Tueller*, 349 F.3d 123 1235 (10th Cir. 2003), however, the Court need not make any finding nding regarding the propriety of impounding the car.

No. 09-402

In the Supreme Court of the United States

MARKICE LAVERT MCCANE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the good-faith exception to the exclusionary rule applies when a law-enforcement officer conducted a vehicle search incident to arrest consistent with then-longstanding court of appeals precedent holding that such a search complies with the Fourth Amendment, but, after the search, that precedent was overturned by *Arizona* v. *Gant*, 129 S. Ct. 1710 (2009).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 5
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Arizona v. *Gant*, 129 S. Ct. 1710 (2009) 3, 7, 8
Griffith v. *Kentucky*, 479 U.S. 314 (1987) 9
Groh v. *Ramirez*, 540 U.S. 551 (2004) 8
Herring v. *United States*, 129 S. Ct. 695 (2009) 4, 6, 7, 9
Illinois v. *Gates*, 462 U.S. 213 (1983) 9
Illinois v. *Krull*, 480 U.S. 340 (1987) 7
Malley v. *Briggs*, 475 U.S. 335 (1986) 8
New York v. *Belton*, 453 U.S. 454 (1981) 2, 7
Thornton v. *United States*, 541 U.S. 615 (2004) 3, 7
United States v. *Brunette*, 256 F.3d 14 (1st Cir. 2001) ... 12
United States v. *Crawley*, 837 F.2d 291 (7th Cir. 1988) .. 11
United States v. *Curzi*, 867 F.2d 36 (1st Cir. 1989) 12
United States v. *Gonzalez*, 578 F.3d 1130 (9th Cir. 2009) 10
United States v. *Humphrey*, 208 F.3d 1190 (10th Cir. 2000) 3, 7
United States v. *Johnson*, 457 U.S. 537 (1982) 9
United States v. *Leon*, 468 U.S. 897 (1984) 5, 6
United States v. *Real Prop. Located at 15324 County Highway E.*, 332 F.3d 1070 (7th Cir. 2003) 11

Case—Continued Page

United States v. *Syphers*,426 F.3d 461 (1st Cir. 2005), cert. denied, 547 U.S. 1158 (2006) 12

Constitution and statutes:

U.S. Const.:
Amend. IV 2, 4, 5, 7, 8, 9
18 U.S.C. 922(g)(1) 2

Miscellaneous:

3 Wayne R. LaFave, *Search & Seizure* 7.1(c) (4th ed. 2004) 8

In the Supreme Court of the United States

No. 09-402

MARKICE LAVERT MCCANE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 573 F.3d 1037. The opinion of the district court (Pet. App. 30-39) is not published in the Federal Supplement but is available at 2008 WL 2740926.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2009. The petition for a writ of certiorari was filed on October 1, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted of possessing a firearm after having been

convicted of a felony, in violation of 18 U.S.C. 922(g)(1). The district court sentenced petitioner to 63 months of imprisonment. The court of appeals affirmed. Pet. App. 1-29.

1. On April 18, 2007, Oklahoma City Police Officer Aaron Ulman observed a vehicle with two passengers straddling the center line between two lanes, had reason to believe the driver might be intoxicated, and executed a traffic stop. Petitioner, who was driving, told the officer that his license was suspended. Officer Ulman then requested that petitioner accompany him to his patrol car and, when petitioner complied, conducted a pat-down search and had petitioner sit in the patrol car's rear seat. Pet. App. 3.

A records check confirmed that petitioner's license was suspended and revealed that the car that petitioner was driving was not registered in petitioner's name. Officer Ulman promptly arrested petitioner for driving on a suspended license, placed petitioner in handcuffs, and returned petitioner to the rear seat of the patrol car. Officer Ulman then asked the other occupant in the stopped vehicle to exit and sit with petitioner in the patrol car's rear seat. The passenger acceded to that request. Officer Ulman searched the passenger compartment of the car and discovered a loaded handgun. Pet. App. 3-4.

2. The district court denied petitioner's pre-trial motion to suppress the handgun, holding that Officer Ulman's search did not violate the Fourth Amendment. Pet. App. 30-39. The court concluded that the warrantless search of the car's passenger compartment was a lawful search incident to arrest under binding court of appeals precedent interpreting this Court's decision in *New York* v. *Belton*, 453 U.S. 454 (1981). Pet. App. 38-

39. The court explained that, under such precedent, officers may conduct such a search "even when the arrestee has been restrained." *Id.* at 38.

3. While petitioner's appeal from his conviction was pending, this Court issued its decision in *Arizona* v. *Gant*, 129 S. Ct. 1710 (2009). *Gant* explained that lower courts across the nation had "widely understood" *Belton* to permit vehicle searches incident to the lawful arrest of the vehicle's recent occupant in circumstances where "there is no possibility the arrestee could gain access to the vehicle at the time of the search." *Id.* at 1718. The Court specifically recognized that the cases upholding searches conducted after the vehicle's occupant had been arrested, handcuffed, and placed in a squad car "are legion." *Ibid.* (quoting *Thornton* v. *United States*, 541 U.S. 615, 628 (2004) (Scalia, J., concurring in the judgment, and citing as among that legion, *inter alia*, *United States* v. *Humphrey*, 208 F.3d 1190, 1202 (10th Cir. 2000)).

Gant ultimately read *Belton* more narrowly than the courts of appeals. *Gant* held that the search of a vehicle incident to a lawful arrest may include the vehicle's passenger compartment only if the "arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" or if "it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Gant*, 129 S. Ct. at 1719 (quoting *Thornton*, 541 U.S. at 632 (Scalia, J., concurring in the judgment)).

4. The court of appeals subsequently affirmed in this case. Pet. App. 1-39.

The court did not dispute petitioner's contention that *Gant*'s holding should apply retroactively to determine whether the pre-*Gant* search in this case comported

with the Fourth Amendment, Pet. App. 16 n.5, and explained that the parties agreed that the search was indeed unconstitutional in light of *Gant*. *Id.* at 6. The court, however, concluded that "[t]he issue before us * * * is not whether the Court's ruling in *Gant* applies to this case, it is instead a question of the proper remedy," *i.e.*, whether the exclusionary rule should apply to foreclose the admission of evidence of petitioner's guilt. *Id.* at 16 n.5.

The court of appeals explained that "[t]he fact that a Fourth Amendment violation occurred * * * does not necessarily mean that the exclusionary rule applies" because, unlike the Fourth Amendment, "[t]he exclusionary rule is not an individual right and applies only where it results in appreciable deterrence." Pet. App. 10 (quoting *Herring* v. *United States*, 129 S. Ct. 695, 700 (2009)). The cost of applying that rule, the court continued, is "letting guilty and possibly dangerous defendants go free—something that offends basic concepts of the criminal justice system"—and the "costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging its application." *Ibid.* (quoting *Herring*, 129 S. Ct. at 701). The court surveyed the decisions of this Court concerning the good-faith exception, *id.* at 11-15, and concluded that they embody two central principles that "build[] upon the underlying purpose of the exclusionary rule": "First, the exclusionary rule seeks to deter objectively unreasonable police conduct," and, second, its purpose "is to deter misconduct by law enforcement officers, not other entities" or institutions. *Id.* at 15.

Based on those principles, the court held that the good-faith exception applies "to a search justified under the settled case law of a United States Court of Appeals,

but later rendered unconstitutional by a Supreme Court decision." Pet. App. 15. In that context, the court explained, the exclusion of evidence would produce "no deterrent effect" because "there is no basis for believing that excluding evidence resulting from an error of the court will 'have a significant deterrent effect on the * * * judge[s]'" whose decisions law-enforcement officers must follow, and because following settled decisional law of the court of appeals "certainly qualifies as objectively reasonable law enforcement behavior." *Id.* at 16-18 (quoting *United States* v. *Leon*, 468 U.S. 897, 916 (1984)).

The court applied that holding by explaining that its prior decision in *Humphrey*, *supra*, "is factually indistinguishable from the instant case" and concluding that several other of its pre-*Gant* decisions "are consistent with *Humphrey*." Pet. App. 8-9 & n.3. The court accordingly held that "[t]he search in this case was wholly consistent with and supported by [its] precedent prior to *Gant*," *id.* at 9, and, for that reason, that "[t]he district court * * * properly denied [petitioner's] motion to suppress." *Id.* at 18.

ARGUMENT

Petitioner contends (Pet. 8-16) that the courts of appeals are in conflict over the applicability of the good-faith exception to conduct that appellate courts considered valid at the time it took place, but is held to be unlawful by a later decision. He also contends (Pet. 16-21) that the Tenth Circuit's decision conflicts with this Court's holding that new Fourth Amendment rules apply to cases pending on direct review. The court of appeals correctly held that, as a remedial matter, the good-faith exception to the exclusionary rule applies where, as

here, a law-enforcement officer conducts a search based on then-settled case law of the court of appeals, which subsequently is overturned by this Court. Although a recent decision by the Ninth Circuit has created a division of authority on the question presented, the government has sought rehearing en banc in that case and that request remains pending. In the government's view, review by this Court would be premature at the present time.

1. a. The exclusionary rule does not apply when law-enforcement officers conduct a search in good faith under settled court of appeals precedent that (at the time) would have upheld the search as lawful. Although that precedent may later be overturned, as in this case, excluding evidence from such a search by officers who comply with the settled jurisprudence of a court of appeals would have no appreciable deterrent effect on law-enforcement conduct. The court of appeals correctly concluded that the evidence of petitioner's guilt was admissible under good-faith exception to the exclusionary rule.

This Court recently emphasized that "the exclusionary rule is not an individual right" and "applies *only* where it 'result[s] in appreciable deterrence.'" *Herring* v. *United States*, 129 S. Ct. 695, 700 (2009) (emphasis added; brackets in original) (quoting *United States* v. *Leon*, 468 U.S. 897, 909 (1984)). Because applying the exclusionary rule in any given case both imposes a "costly toll upon truth-seeking and law enforcement objectives" and "offends basic concepts of the criminal justice system" by "letting guilty and possibly dangerous defendants go free," the Court has made clear that "the benefits of deterrence must outweigh the costs" in order to warrant the exclusion of evidence obtained in viola-

tion of the Fourth Amendment. *Id.* at 700-701 (citations omitted). It is insufficient that exclusion would have some deterrent effect. *Id.* at 702 n.4. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Id.* at 702. As a result, "evidence should be suppressed '*only* if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Id.* at 701 (emphasis added) (quoting *Illinois* v. *Krull*, 480 U.S. 340, 348-349 (1987)).

Applying the exclusionary rule in this case would have no such deterrent effect. This Court in *Gant* recognized that (until April 2009) the court of appeals decisions that had interpreted *New York* v. *Belton*, 453 U.S. 454 (1981), and upheld materially identical searches "are legion." *Arizona* v. *Gant*, 129 S. Ct. 1710, 1718 (2009) (quoting *Thornton* v. *United States*, 541 U.S. 615, 628 (2004) (Scalia, J., concurring in the judgment)). Justice Scalia's concurring opinion in *Thornton*, which *Gant* quotes, specifically identifies the Tenth Circuit's decision in *United States* v. *Humphrey*, 208 F.3d 1190, 1202 (10th Cir. 2000), as amongst that "legion." See *Thornton*, 541 U.S. at 628 (Scalia, J., concurring in the judgment). And, as the court of appeals explained here, *Humphrey* "is factually indistinguishable from the instant case" and is consistent with other Tenth Circuit precedent that, at the time of the search, reflected binding decisional law for Officer Ulman. See Pet. App. 8-9.

It follows that excluding evidence obtained from the officer's search of petitioner's vehicle would not serve any appreciable deterrent function. The court of ap-

peals' pre-*Gant* understanding of the *Belton* rule accorded with the "widely understood" interpretation of *Belton* amongst the courts of appeals before April 2009, and that understanding "ha[d] been widely taught in police academies" for over a quarter century and had been followed by law-enforcement officers in the field "in conducting vehicle searches during [that period]." See *Gant*, 129 S. Ct. at 1718, 1722; cf. 3 Wayne R. LaFave, *Search & Seizure* 7.1(c) at 517 & n.89 (4th ed. 2004) ("[U]nder *Belton* a search of the vehicle is allowed * * * even after the defendant was removed from it, handcuffed, and placed in the squad car.") (collecting cases). Thus, before *Gant*, an objectively reasonable officer would have done exactly what Officer Ulman did. Relying on settled court of appeals authority to conduct a search "certainly qualifies as objectively reasonable law enforcement behavior" and it is not the mission of the exclusionary rule to deter such behavior. Pet. App. 16-18 (noting that because the exclusionary rule is not designed to deter judges, "excluding evidence based on judicial error would serve no deterrent purpose").

Gant confirms that conclusion. As petitioner notes (Pet. 20), the Court has "explained that 'the same standard of objective reasonableness that [it] applied in the context of [the good-faith exception to suppression] in *Leon*" also "defines the qualified immunity accorded an officer" in the Fourth Amendment context. *Groh* v. *Ramirez*, 540 U.S. 551, 565 n.8 (2004) (quoting *Malley* v. *Briggs*, 475 U.S. 335, 344 (1986)) (citation omitted). *Gant*'s conclusion that qualified immunity will protect from liability those officers who conducted unconstitutional vehicle searches before *Gant* in reasonable reliance on the prevailing pre-*Gant* understanding of *Belton*, see *Gant*, 129 S. Ct. at 1722 n.11, should therefore

compel the conclusion that the good-faith exception to the exclusionary rule also applies and permits the admission of the evidence obtained from such searches.

b. Petitioner contends (Pet. 16-21) that the court of appeals' decision conflicts with this Court's decisions in *United States* v. *Johnson*, 457 U.S. 537 (1982), and *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), which hold that Fourth Amendment decisions by this Court govern the constitutionality of searches in cases that, at the time, are still pending on direct review. Petitioner is incorrect. Those decisions reflect the principle that, on direct review, judicial evaluation of the constitutionality of a search must accurately resolve that constitutional question by recourse to all authoritative decisions of this Court, including those issued after the search in question. See *Griffith*, 479 U.S. at 322-323 (explaining similarly situated defendants should all benefit from the same understanding of the Fourth Amendment). That retroactivity jurisprudence does not speak to the good-faith exception to the exclusionary rule. Unlike the Fourth Amendment, "the exclusionary rule is not an individual right." *Herring*, 129 S. Ct. at 700. And "[t]he question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Illinois* v. *Gates*, 462 U.S. 213, 223 (1983).

Petitioner also errs in his contention (Pet. 20) that the Court's disposition in *Gant* reflects the Court's understanding that the good-faith exception does not apply in this context. As noted, *Gant*'s treatment of the qualified-immunity question is inconsistent with petitioner's reading of the Court's silence on this point. See

pp. 8-9, *supra*. Indeed, *Gant* had no occasion to (directly) address whether the good-faith exception should apply because the State in *Gant* focused entirely on the constitutionality of the search and failed to argue as an alternative that the good-faith exception would warrant reversal. The Court's silence on a point not argued does not preclude the government from advancing, and the court of appeals from accepting, the good-faith exception as a basis for affirming petitioner's conviction.

2. Petitioner's assertion of a three-way division of authority (Pet. 8-16) is greatly overstated. The Ninth Circuit's recent decision in *United States* v. *Gonzalez*, 578 F.3d 1130 (2009), is the only decision that petitioner cites that conflicts with the decision in this case. In the government's view, the Court's plenary review is unwarranted at the present time because that newly developed conflict may be eliminated by the court of appeals on rehearing.

One month after the Tenth Circuit issued its decision in this case, a panel of the Ninth Circuit held that the good-faith exception to the exclusionary rule does not apply to a pre-*Gant* vehicle search found unconstitutional under *Gant*, even if that search was conducted by law-enforcement officers in good faith pursuant to the then-prevailing understanding of *Belton*. See *Gonzalez*, 578 F.3d at 1132. The panel's brief analysis, which spans barely more than one page in the Federal Reporter, neither cites or otherwise acknowledges the Tenth Circuit's decision in this case and, thus, fails to address the Tenth Circuit's good-faith analysis. The government filed a petition for rehearing en banc in *Gonzalez*, the Ninth Circuit called for a response, and the petition and opposition are currently pending before the court of appeals. If the Ninth Circuit grants either

panel or en banc rehearing and aligns itself with the Tenth Circuit, its decision will eliminate the current conflict on the question presented in this petition.

Petitioner fails to identify any other division of authority warranting review. Although petitioner asserts that the Seventh and First Circuits have issued decisions in conflict with the decision below, Pet. 12-16, none of those decisions reflect a conflict of authority. The Seventh Circuit, for instance, held that the good-faith exception to the exclusionary rule *applied* to the unconstitutional search before it in *United States* v. *Real Property Located at 15324 County Highway E.*, 332 F.3d 1070 (2003), because law-enforcement agents acted in good-faith reliance on a search warrant. *Id.* at 1075-1076. Although the court stated in dicta that it "decline[d] to extend further the applicability of the good-faith exception to evidence seized during law enforcement searches conducted in naked reliance upon subsequently overruled case law," *id.* at 1076, its decision to "decline" to rest its judgment on those grounds did not definitively reject the possibility that the court might accept such an interpretation in the future in a case involving a warrantless search. Indeed, the court was not presented with the question, and it properly held the good-faith exception applicable on narrower grounds appropriate to searches conducted pursuant to a judicial warrant. Cf. *United States* v. *Crawley*, 837 F.2d 291, 292-293 (7th Cir. 1988) (declining to follow dictum in a previous panel decision).

The First Circuit decisions that petitioner cites (Pet. 15) likewise fail to reflect a division of authority. None of the cases addresses circumstances where an officer conducts a good-faith search that would have been found lawful under court of appeals precedent that was settled

when the search was performed. And two of those decisions appear to provide some support for the reasoning of the Tenth Circuit in this case by holding that officers reasonably relied on a defective warrant in light of then-existing law. See *United States* v. *Syphers*, 426 F.3d 461, 467-468 (1st Cir. 2005) (applying good-faith exception where law enforcement officers who relied on a defective warrant had an "objectively reasonable belief" that the warrant was valid "[u]nder then-prevailing caselaw"), cert. denied, 547 U.S. 1158 (2006); *United States* v. *Brunette*, 256 F.3d 14, 19-20 (1st Cir. 2001) (applying good-faith exception to reliance on defective warrant where "the uncertain state of the law at the time made reliance on the warrant objectively reasonable"); see also *United States* v. *Curzi*, 867 F.2d 36, 38, 44 (1st Cir. 1989) (finding unreasonable a warrantless search of a defendant's home where "[n]o endeavor was made to procure a search warrant" despite "ample time" to do so; rejecting invocation of the good-faith exception where officers did not rely on subsequently overtured precedent or act pursuant to an "error [that] was attributable * * * to some errant judicial officer").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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153

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In The

Supreme Court of the United States

MARKICE LAVERT McCANE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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TABLE OF CONTENTS

		Page
I.	The Government Concedes That A Circuit Split Exists	1
II.	The Government Cannot Reconcile The Decision Below With *Katz V. United States*, *Stone v. Powell*, And *Arizona V. Gant*, A Conclusion Confirmed By The Government's Refusal To Even Argue Good Faith In Some Circuits After *Gant*	4
III.	The Government Cannot Reconcile The Decision Below With This Court's Retroactivity Caselaw	8
IV.	Delay Would Cause Extraordinary Unfairness Because Fourth Amendment Claims Do Not Provide A Basis For Relief On Collateral Review	10
V.	The Decision Below Is A Dramatic Departure From Accepted Practice That Would Alter The Basic Structure Of Fourth Amendment Litigation	12
CONCLUSION		14

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 5

Arizona v. Gant, 129 S. Ct. 1710 (2009) .....*passim*

Desist v. United States, 394 U.S. 244 (1969).....8, 9, 10, 13

Dukes v. Wal-Mart, Inc., 556 F.3d 919 (9th Cir. 2009) 11

Dukes v. Wal-Mart, Inc., 509 F.3d 1168 (9th Cir. 2007) 11

Griffith v. Kentucky, 479 U.S. 314 (1987) 9

Katz v. United States, 389 U.S. 347 (1967).....4, 13

New York v. Belton, 453 U.S. 454 (1981).....6

Powell v. Nevada, 511 U.S. 79 (1994) 9

See v. City of Seattle, 387 U.S. 541 (1967) 13

State v. Gant, 162 P.3d 640 (Ariz. 2007) 6

State v. Harris, ___ P.3d ___, 2010 WL 45755 (Wash. App. 2010) 2

Stone v. Powell, 428 U.S. 465 (1976).....4, 10

Stovall v. Denno, 388 U.S. 293 (1967).....8

United States v. Contreras, 2009 WL 3241915 (9th Cir. 2009) 1

United States v. Curzi, 867 F.2d 36 (1st Cir. 1989) 3

United States v. Gonzalez, 578 F.3d 1130 (9th Cir. 2009) 1, 10

TABLE OF AUTHORITIES – Continued

Page

United States v. Gray, 2009 WL 4739740 (D. Neb. 2009) 3

United States v. Hrasky, 309 Fed.Appx. 83 (8th Cir. 2009) 6

United States v. Hrasky, 453 F.3d 1099 (8th Cir. 2006) 6

United States v. Hrasky, 567 F.3d 367 (8th Cir. 2009) 6, 7

United States v. Johnson, 256 F.3d 895 (9th Cir. 2001) 2

United States v. Leon, 468 U.S. 897 (1984) 3, 5, 9

United States v. Mays, 2009 WL 536912 (E.D.Wis. 2009) 11

United States v. Owens, 2009 WL 2584570 (N.D.Fla. 2009) 11

United States v. Peoples, ___ F.Supp.2d ___, 2009 WL 3586564 (W.D.Mich. 2009) 2, 3

United States v. Real Property Located at 15324 County Highway E., 332 F.3d 1070 (7th Cir. 2003) 2, 3

United States v. Stotler, ___ F.3d ___, 2010 WL 114938 (7th Cir. 2010) 7

OTHER AUTHORITIES

1 W. LaFave, Search and Seizure § 1.3(g) (4th ed. 2004) 5

REPLY BRIEF FOR PETITIONER

The Government's arguments cannot withstand scrutiny. The decision below creates an acknowledged split that conflicts with the holdings of several circuits and many decisions of this Court. The decision below is a dramatic departure from accepted practice that would alter the basic structure of Fourth Amendment litigation. Finally, delay to let the issue percolate would cause extraordinary unfairness.

I. The Government Concedes That A Circuit Split Exists.

The Government concedes the circuit split between the decision below and *United States v. Gonzalez*, 578 F.3d 1130 (9th Cir. 2009). *See* BIO at 10-11. Although the government suggests that *Gonzalez* is unpersuasive, the arguments for the good-faith exception were squarely raised and squarely rejected by the Ninth Circuit. Later panels have properly recognized that *Gonzalez* is binding. *See, e.g., United States v. Contreras*, 2009 WL 3241915 (9th Cir. 2009). Indeed, in the short time since the Petition in this case was filed, two additional lower courts have examined the circuit

split and adopted the Ninth Circuit's view that no good-faith exception can apply to these facts.[1]

The government denies the circuit split with the Seventh Circuit by construing the Seventh Circuit's decision as dicta. *See* BIO at 11 (citing *United States v. Real Property Located at 15324 County Highway E.*, 332 F.3d 1070 (7th Cir. 2003)). This is incorrect. The Seventh Circuit announced and applied a rule that the good-faith exception does not apply unless the government has obtained a warrant. *See 15324 County Highway*, 332 F.3d at 1076. Although the Seventh Circuit applied that rule in a case where a warrant was obtained, the rule is equally binding in a warrantless case such as this one. *See United States v. Johnson*, 256 F.3d 895, 915-16 (9th Cir. 2001) (Opinion of Kozinski, J.) ("Where . . . it is clear that a majority of the panel has focused on the legal issue presented by the case before it and made a deliberate decision to resolve the issue, that ruling becomes the law of the circuit and can only be overturned by an en banc court or by the Supreme Court.").

Two recent district court decisions have agreed. Both decisions surveyed the circuit split raised by this petition, and both concluded that the Seventh Circuit's rejection of the good-faith exception was a

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[1] *See State v. Harris*, ___ P.3d ___, 2010 WL 45755 at *7 (Wash. App. 2010) ("We too decline to apply the good-faith exception here."); *United States v. Peoples*, ___ F.Supp.2d ___, 2009 WL 3586564 (W.D.Mich. 2009) (rejecting the good-faith exception for *Gant* violations).

holding rather than dicta. *See United States v. Peoples*, ___ F.Supp.2d ___, 2009 WL 3586564 at *4 (W.D.Mich. 2009) (stating that the Seventh Circuit's decision in *15324 County Highway* "reached the opposite conclusion" as the decision in the case below, and describing its rejection of the good-faith exception as a "holding"); *United States v. Gray*, 2009 WL 4739740, at *3 (D. Neb. 2009) (including the Seventh Circuit's decision as a case that "refused to apply the Leon's good-faith exception to warrantless searches, holding instead that *Leon* applies only to searches conducted pursuant to a warrant").

Petitioner concedes it is difficult to count with precision how many circuits have rejected the good-faith exception. The Ninth Circuit is clearly one, and the Seventh Circuit is a second. However, some circuits have rejected the good-faith exception for warrantless searches generally without addressing whether it would apply to claims based on changing law specifically. *See, e.g., United States v. Curzi*, 867 F.2d 36, 44 (1st Cir. 1989). Such circuits may or may not count in the overall assessment of the split. For example, one recent District Court decision concluded that three circuits have rejected the good-faith exception under these circumstances. *See Gray*, 2009 WL 4739740, at *3 (finding that the Ninth Circuit, Seventh Circuit, and Sixth Circuit have rejected the good-faith exception). In contrast, another district court concluded that only two circuits have rejected the good-faith exception. *See, e.g., Peoples*, 2009 WL 3586564 at *4 (counting the Ninth Circuit and the

Seventh Circuit). Whether the proper number is two, three, or more, the fact remains that this is a clear and widely recognized circuit split.

II. The Government Cannot Reconcile The Decision Below With *Katz v. United States*, *Stone v. Powell*, And *Arizona v. Gant*, A Conclusion Confirmed By The Government's Refusal To Even Argue Good Faith In Some Circuits After *Gant*.

The Government's claim that the decision below is consistent with this Court's decisions is manifestly unpersuasive. As explained in the Petition, the famous case of *Katz v. United States*, 389 U.S. 347 (1967), rejected an exception to the exclusionary rule for reasonable reliance on subsequently overruled caselaw. *See* Pet. for Cert. at 18-19; *Katz*, 389 U.S. at 356. Unfortunately, the Government's Brief in Opposition offers no response. The BIO does not even cite *Katz*, much less try to reconcile *Katz*'s apparent rejection of a reasonable reliance exception with the decision below.

Similarly, *Stone v. Powell*, 428 U.S. 465 (1976), expressly weighed the costs and benefits of the exclusionary rule and concluded that the exclusionary rule must apply "at trial and its enforcement on direct appeal" in Fourth Amendment cases. *Id.* at 493. The BIO does not cite *Stone v. Powell* or try to reconcile its conclusion with the contrary decision below.

The Government does attempt to reconcile the decision below with *Arizona v. Gant*, 129 S. Ct. 1710 (2009), but its argument reflects a basic misunderstanding of Fourth Amendment law. The Government focuses on the *Gant* footnote stating that qualified immunity would block civil lawsuits for *Gant* violations. BIO at 8-9 (citing *Gant*, 129 S. Ct. at 1722 n.11). The Government assumes that if qualified immunity is available, then so is the good-faith exception. It therefore reasons that the *Gant* footnote mentioning qualified immunity "compel[s] the conclusion that the good-faith exception to the exclusionary rule also applies." BIO at 8-9.

This is simply wrong. Qualified immunity is a general privilege from suit that can be raised in any Fourth Amendment civil case against the police. *See Anderson v. Creighton*, 483 U.S. 635, 638-40 (1987). In contrast, the good-faith exception to the exclusionary rule has been recognized in only a few specific and discrete contexts. *See* 1 W. LaFave, Search and Seizure § 1.3(g) (4th ed. 2004). This difference explains why the Court often agrees to hear new cases to determine whether the good-faith exception should be recognized. Each new case carves out a specific domain in which good-faith arguments can or cannot be raised. *See United States v. Leon*, 468 U.S. 897, 927-28 (1984) (Blackmun, J., concurring) (noting that the scope of the good-faith exception is rooted in a provisional "empirical judgment about the effect of the exclusionary rule in a particular class of cases").

The *Gant* majority responded to the dissent's concerns about the scope of suppression *in criminal cases* by mentioning that qualified immunity would apply *in civil cases* because it understood that no good-faith exception applied in such circumstances. That explains the Court's unusual step of affirming the Arizona Supreme Court's decision vacating Gant's conviction rather than remanding for further proceedings. The Arizona Supreme Court had specifically looked for exceptions that might have preserved Gant's conviction, but after a review of several possible exceptions it had found none. *See State v. Gant*, 162 P.3d 640, 646 (Ariz. 2007). Both the state court and this Court understood that no good-faith exception applied and Gant's conviction had to be vacated.

This understanding of *Gant* is confirmed by the Justice Department's refusal to even argue the good-faith exception in some circuits in cases with facts essentially identical to those of this petition. For example, in *United States v. Hrasky*, 567 F.3d 367 (8th Cir. 2009), the defendant was arrested for driving on a suspended license and put in the back of the officer's squad car before his car was searched and two handguns were found. On interlocutory appeal, the Eighth Circuit ruled that guns were admissible as searches incident to arrest under the bright-line rule of *New York v. Belton*, 453 U.S. 454 (1981). *See United States v. Hrasky*, 453 F.3d 1099, 1011 (8th Cir. 2006). The Eighth Circuit affirmed the conviction by an unpublished order. *See United States*

v. Hrasky, 309 Fed.Appx. 83 (8th Cir. 2009). Hrasky then petitioned for rehearing in light of *Gant*.

Instead of arguing the good-faith exception, the Government confessed error and acknowledged that the conviction had to be vacated. *Hrasky*, 567 F.3d at 368. Judge Colloton explained the Justice Department's position in his decision vacating the conviction:

> [T]he government makes no argument in this case for application of a good-faith exception to the exclusionary rule, and expressly concedes that "due to the Supreme Court's decision in *Arizona v. Gant*, the two handguns seized from Appellant's vehicle should be suppressed." As a result, the government concludes, "the conviction on appeal must be vacated."

Id. (internal citation omitted). *See also United States v. Stotler*, ___ F.3d ___, 2010 WL 114938 at *8 n.4 (7th Cir. 2010) (Sykes, J., dissenting) (noting that "[n]either has the government raised the good-faith exception to the exclusionary rule as a basis to affirm" for a search in violation of *Arizona v. Gant* that predated *Gant*).

It is striking that the Government now defends as plainly correct a position that *it declined to even argue* in another circuit with facts essentially identical to those in this petition. The Government's refusal to argue good faith in some circuits following

Gant shows the weakness of its present effort to reconcile *Gant* with the good-faith exception.

III. The Government Cannot Reconcile The Decision Below With This Court's Retroactivity Caselaw.

The Government argues that the decision below is consistent with the Court's retroactivity decisions because the good-faith inquiry is distinct from retroactivity. *See* BIO at 9. Again, the Government is mistaken. The two doctrines share the same history and were designed to be complimentary. The Government's new approach to the good-faith exception therefore effectively overturns decades of retroactivity caselaw.

A short history lesson is helpful here. During the Warren Court era, this Court adopted a balancing approach to whether new criminal procedure decisions expanding constitutional rights should apply on direct review. *See Stovall v. Denno*, 388 U.S. 293 (1967). Under that framework, new decisions were applicable on direct review only if it would serve "the deterrent purpose of the exclusionary rule" in light of the fact that retroactive application, and its resulting application of the exclusionary rule, would "overturn convictions based on fair reliance upon [overruled] decisions." *Desist v. United States*, 394 U.S. 244, 253 (1969).

That balancing approach to retroactivity inspired the adoption of the good-faith exception for defective

warrants in *United States v. Leon*, 468 U.S. 897 (1984). As the Court noted in *Leon*, "the balancing approach that has evolved during the years of experience" in the retroactivity setting "provides strong support for the modification currently urged upon us" in the good-faith exception. *Id.* at 913. In short, the good-faith exception was modeled from and designed to replicate the basic approach the Court applied to the retroactivity of new decisions on direct review. *Id.* at 912-13, n.10.

Three years after *Leon*, however, the Court abandoned the case-by-case balancing approach of retroactivity in favor of a bright-line rule in *Griffith v. Kentucky*, 479 U.S. 314 (1987). *Griffith* relied heavily on Justice Harlan's dissent in *Desist,* in which Harlan had called for a clear rule that the exclusionary rule applied to all new decisions on direct review: "If a 'new' constitutional doctrine is truly right, we should not reverse lower courts which have accepted it; nor should we affirm those which have rejected the very arguments we have embraced." *Desist*, 394 U.S. at 259 (Harlan, J., dissenting). Under *Griffith*, all new criminal procedure cases apply in full force on direct review. *See Powell v. Nevada*, 511 U.S. 79, 94 (1994).

This history shows why the Government's approach to the good-faith exception is starkly inconsistent with existing retroactivity law. By unhinging the good-faith exception from its origins in retroactivity law, the government imagines a good-faith exception that effectively overturns *Griffith* and returns the law to the discredited version from the

Warren Court years. Indeed, the Government's approach to the good-faith exception in this case tracks the long-abandoned retroactivity standard from *Desist* almost to the letter. That is not consistent with the Court's present retroactivity law. Rather, it is a repudiation of it.

IV. Delay Would Cause Extraordinary Unfairness Because Fourth Amendment Claims Do Not Provide A Basis For Relief On Collateral Review.

The Government's brief argues that granting review would be "premature." BIO at 6. The Government has petitioned for rehearing in *Gonzalez* with the goal of overturning that decision. *Id.* at 10. The Government therefore asks the Court to wait rather than grant review.

Such an approach would cause extraordinary unfairness because Fourth Amendment claims are not recognizable in habeas corpus or other collateral review proceedings. *See Stone v. Powell*, 428 U.S. 465, 493 (1976). If a defendant litigates a Fourth Amendment issue on direct review and loses, he cannot obtain relief on that argument in a habeas proceeding even if the law has changed to recognize the claim. *See id.* As a result, letting this issue percolate will have the effect of permanently denying relief to McCane and the many other defendants presently in the pipeline whose rights were violated under

Arizona v. Gant before their cases became final. Justice delayed will be justice denied.

Further, there is no telling when the Ninth Circuit might rule on the government's petition for rehearing. Petitions for rehearing can remain pending for a long time. When a panel of the Ninth Circuit handed down its decision in *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168 (9th Cir. 2007), it took *more than 14 months* for the en banc court to finally rule on whether it would grant the petition for rehearing. *See Dukes v. Wal-Mart, Inc.*, 556 F.3d 919 (9th Cir. 2009) (ruling on the petition). While such a delay may be acceptable in some cases, it is not acceptable given that the precise issue in this petition is currently pending in several additional circuits with others expecting briefing very soon.[2]

If the Court denies certiorari in this petition, the Justice Department can continue to attempt to delay this issue by petitioning for rehearing in response to

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[2] Although the Westlaw CTA-BRIEFS database is incomplete, it shows the United States has filed briefs arguing good faith for *Gant* violations in the Fourth Circuit, Sixth Circuit, and Eighth Circuit. *See* Brief of United States in *United States v. Stitt*, available at 2009 WL 2430351; Brief of United States in *United States v. Johnson*, available at 2009 WL 5069080; Brief of United States in *United States v. Salamasina*, available at 2009 WL 2955464. District court decisions accepting the good faith exception in the Eleventh Circuit and Seventh Circuit suggest that cases may be pending in those circuits soon. *See United States v. Owens*, 2009 WL 2584570 (N.D.Fla. 2009); *United States v. Mays*, 2009 WL 536912 (E.D.Wis. 2009). The issue is also pending in several state supreme courts.

any adverse decisions and citing its pending petition for rehearing as a reason to deny any future petitions for certiorari. Meanwhile, more denials will mean more final convictions. This Court should not permit such tactics in light of its unfairness to the Petitioner and others similarly situated.

V. The Decision Below Is A Dramatic Departure From Accepted Practice That Would Alter The Basic Structure Of Fourth Amendment Litigation.

The BIO is largely devoted to arguing that the decision below is correct. *See* BIO at 6-8. However, the approach adopted by the decision below would severely damage the traditional process of Fourth Amendment development.

Under the decision below, no rational criminal defendant would ever argue that a court should depart from prior law in his favor. By expressly seeking a departure from prior law, the defendant would effectively concede that he is not entitled to relief under the good-faith exception. In the rare case when a defendant would volunteer such a claim, the good-faith exception would force the courts to render advisory opinions: No defendant could benefit from his own argument. For criminal defendants, Fourth Amendment litigation would resemble a game of "heads I win, tails you lose."

The result would make Fourth Amendment litigation strikingly asymmetrical. The government would be free to argue for changes in the law in the government's favor, and any decision in its favor would immediately apply to all cases on direct review. Defendants could make no such arguments. To avoid the good-faith exception, defendants would have to argue, however bizarrely, that they were entitled to relief under preexisting law. This Court would be denied access to the honest and direct arguments in favor of and against prospective legal rules upon which the development of Fourth Amendment law traditionally has been based. *See v. City of Seattle*, 387 U.S. 541, 546 (1967).

During the Warren Court era, this Court avoided such a result by applying new rules to the one defendant whose case recognized the new right but sometimes denying relief to others in the pipeline. *Compare Katz v. United States*, 389 U.S. 347 (1967) (applying the exclusionary rule to a case announcing new law) *with Desist v. United States*, 394 U.S. 244 (1969) (rejecting the exclusionary rule for *Katz* violations for all others on direct review). In contrast, the Government expressly argues that the exclusionary rule should not apply even in the first case recognizing the right. *See* BIO at 10.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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No. 09-402

Supreme Court, U.S.
FILED
MAR 24 2010
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

MARKICE LAVERT McCANE, *Petitioner*,

v.

UNITED STATES

PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on March 1, 2010, and (2) granting the petition. The grounds supporting this motion are the following:

(1) THE DENIAL OF REHEARING IN UNITED STATES V. GONZALEZ

On March 16, 2010, the primary basis articulated in the BIO for denying the petition was eliminated. The BIO argued that review would be "premature at the present time" because the Government's petition for rehearing was still pending in *United States v. Gonzalez*, 578 F.3d 1130 (9th Cir 2009). *See* BIO at 6. The BIO explained:

> In the government's view, the Court's plenary review is unwarranted at the present time because that newly developed conflict may be eliminated by the court of appeals on rehearing.
>
> The government filed a petition for rehearing en banc in *Gonzalez*, the Ninth Circuit called for a response, and the petition and opposition are currently pending before the court of appeals. If the Ninth Circuit grants either panel or en banc rehearing and aligns itself with the Tenth Circuit, its decision will eliminate the current conflict on the question presented in this petition.

BIO at 6.

On March 16, the Ninth Circuit eliminated this argument by denying the petition for panel rehearing and rehearing en banc. *See United States v. Gonzalez*, --- F.3d ----, 2010 WL 917204 (9th Cir 2010) ("The petition for rehearing and the petition for rehearing en banc are DENIED.").

Judge Betty Fletcher authored an extensive opinion concurring in the denial that explained why "the panel's decision is compelled by the Supreme Court's retroactivity precedents and dictated by *Gant*." *Id.* at *6. Judge Bea filed a lengthy dissenting opinion, joined by six other judges, that recognized that the denial of the petition for rehearing "set the stage" for Supreme Court review:

> If there is a silver lining to the panel's decision to flout Supreme Court case law in *Herring* and *Krull*, it is that the panel has set the stage for the Supreme Court to review the scope of the exclusionary rule in light of the circuit split we have now created. The panel's opinion reaches a conclusion directly contrary to that of *McCane*, 573 F.3d 1037, which held the good faith exception applies to searches held unconstitutional in *Gant*.

Id. at *9.

The stage has now been set. The barrier to review articulated in the BIO has now been erased. Further, as far as counsel is aware, no other petition has yet been filed before this Court that raises the pressing issues articulated in this petition. Petitions for rehearing are rarely granted. But this is one of those rare cases in which it is warranted. Revisiting the denial of the petition for certiorari provides the best opportunity for this Court to review this pressing and important question of federal constitutional law.

(2) THE ELEVENTH CIRCUIT'S DECISION IN UNITED STATES V. DAVIS

On March 11, 2010, the Eleventh Circuit further deepened the circuit split by handing down *United States v. Davis*, -- F.3d --, 2010 WL 810984 (11th Cir. 2010). Like *McCane* and *Gonzalez*, *Davis* asks whether the good faith exception applies to a pre-*Gant* search invalidated by *Gant*. In an opinion by Judge Kravitch, joined by Judges Barkett and Tjoflat, the Eleventh Circuit recognized the clear circuit split and then agreed that a good-faith exception should apply in such circumstances:

> We are not the first court of appeals to consider this question, but the other circuits have split on the issue. In the aftermath of *Gant*, the Ninth and Tenth Circuits have reached opposite conclusions as to the exclusionary rule's application in cases like this one. *Compare United States v. Gonzalez*, 578 F.3d 1130 (9th Cir. 2009) (applying the exclusionary rule to a pre-*Gant* search), *with United States v. McCane*, 573 F.3d 1037 (10th Cir.2009) (relying on the rule's good-faith exception and refusing to require the suppression of evidence), *cert. denied*, No. 09-402, 2010 WL 680526, --- U.S. ----, --- S.Ct. ----, --- L.Ed.2d ---- (Mar. 1, 2010). Similarly, before *Gant*, the Fifth Circuit refused to apply the exclusionary rule when police had relied in good faith on prior

> circuit precedent, *United States v. Jackson*, 825 F.2d 853, 866 (5th Cir.1987) (*en banc*), but the Seventh Circuit expressed skepticism about applying the rule's good-faith exception when police had relied solely on caselaw in conducting a search, *United States v. 15324 County Highway E.*, 332 F.3d 1070, 1076 (7th Cir.2003). We now enter the fray and hold that the exclusionary rule does not apply when the police conduct a search in objectively reasonable reliance on our well-settled precedent, even if that precedent is subsequently overturned.

Id. at *3.

Notably, however, the Eleventh Circuit expressly limited the good-faith exception to reliance on "unequivocal" precedent. *See id.* at *6 ("We stress, however, that our precedent on a given point must be unequivocal before we will suspend the exclusionary rule's operation."). This limitation appears to make the Eleventh Circuit's version of the good-faith exception somewhat different from the standard adopted by other courts. The Fifth Circuit's good faith reliance exception contains no such limitation, *see United States v. Jackson*, 825 F.2d 853, 866 (5th Cir. 1987) (en banc), and the Tenth Circuit in the decision below referred to merely "settled" law of a court of appeals, 573 F.3d at 1044.

This limitation also renders the Eleventh Circuit's version of the good-faith exception quite different from the qualified immunity standard that applies in the civil context, even though this Court has instructed that the standard of the good-faith exception and the standard of qualified immunity are the same when they each apply. *See Groh v. Ramirez*, 540 U.S. 551, 565 n.8 (2004). Qualified immunity attaches unless it is "clearly established" that the conduct was unlawful. *Id.* at 563. The issue is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* The Eleventh Circuit's formulation of the good-faith exception flips that standard on its head. Under the Eleventh Circuit's decision, the good-faith exception does not apply unless it is clearly established that the conduct was *lawful*. Thus, in the qualified immunity context, ambiguity means the government wins; in the good-faith context, the same ambiguity means the government loses. The Eleventh Circuit's limitation seems hard to square with this Court's insistence that qualified immunity and the good-faith exception apply the same test.

(3) THE UTAH SUPREME COURT'S OPINION IN STATE V. BAKER

On March 12, 2010, the Utah Supreme Court became the first state Supreme Court to address the circuit split in *State v. Baker*, --- P.3d ----, 2010 WL 84127 (Utah 2010). The Utah Supreme Court joined the Eleventh Circuit the day before in *Davis* by recognizing a good faith exception in these

circumstances. *See id.* at *11. Like the Eleventh Circuit in *Davis*, the Utah court limited the good-faith exception to instances in which the caselaw is unambiguous. *See id.* ("If the case law had been ambiguous prior to the time the officers conducted a search later definitively declared unconstitutional, the good-faith exception would not apply and the evidence would be excluded.").

The decisions in *Gonzalez*, *Davis* and *Baker* should assuage any objections that granting the petition for certiorari would be premature. In just three weeks since the denial of the petition, two circuit courts and one state supreme court have handed down three decisions addressing the wisdom of a good-faith exception for changing law. These three new decisions address any concerns that the clear circuit split might be overturned en banc or that additional percolation could be helpful.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

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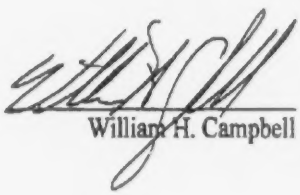
March 23, 2010

RULE 44.2 CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds as specified in Rule 44.2, specifically, "intervening circumstances of a substantial . . effect."



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